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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ~~73~~ - 1084

WENDELL P. RYNERSON, - - - Petitioner

versus

THE UNITED STATES, - - - - Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WENDELL P. RYNERSON
403 E. Second Street
Madison, Indiana 47250
Petitioner and Attorney for Himself

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Petition for Certiorari 1

Opinions Below .....2 and passim; App. 8–35*

Kirby v. U. S., 201 Ct. Cl. 527.....passim; App. 15–34

Dissenting opinions .....passim; App. 27–34

Judge Davis .....passim; App. 27–30

Judge Nichols .....passim; App. 30–34

Rynerson v. U. S., unreported.....passim; App. 8–15, 34, 35

Jurisdiction of Supreme Court 2

Questions Presented 3

Constitutional Provisions .....5; App. 1

Statutes .....3-5 and passim; App. 1-5

Rules of Lower Court .....5; App. 5-7

Statement of the Case 5–13

Jurisdiction of the Lower Court 7

Reasons for Granting the Writs 13–42

Nature of the Case 15–19

A. The 1973 Decision of the Lower Court Misinterprets the Statute of Limitations and Related Public Policies, Ignores Its Own Rules, and Improperly Gives Retroactive Effect to a New Rule of Law 15–38

*In copying the Appendix, the word and sign for Section were sometimes omitted and sometimes indicated by X or by a dash. The Appendix, being voluminous, is separately presented (concurently herewith) under Rule 23(1). It bears a light blue cover.

PAGE

Reasons for Granting the Writs—Continued

Statute of Limitations 20–28

Laches 28–31

Other Public Policies 31–35

Retroactive Effect of New Rule of Law Was Improper 35–38

B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action 38–42

Conclusion 43

TABLE OF AUTHORITIES CITED

Cases

PAGE

Alpert v. U. S. (1963), 161 Ct. Cl. 610 30

Appel v. U. S. (1955), 130 Ct. Cl. 688, 128 F. Supp. 153 ..... 6, 20

Belton v. Trayner (C. A. Va. 1967), 381 F. 2d 82...32, note

Cason v. U. S. (1972), 198 Ct. Cl. 650, 461 F. 2d 784.. 9, 30

Cason v. U. S. (1973), 200 Ct. Cl. 424, 471 F. 2d 1225 9, 17, 30

Cohens v. Virginia (1821), 6 Wheat. 264 at 404, 19 U. S. 82 at 100, 5 L. Ed. 257 21

Crown Coat Front Co. v. U. S. (1967), 386 U. S. 503 at 511 and 515, 87 S. ct. 1177, 18 L. Ed. 2d 256.... 24

Denby v. Berry (1923), 263 U. S. 29, 44 S. ct. 74, 68 L. Ed. 148 ..... 8, 14 41, 42

Diamond v. U. S. (1970), 192 Ct. Cl. 502, 427 F. 2d 1246, note 11 39

England v. Louisiana State Board of Medical Examiners, (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. ct. 461 ..... 21, 32 35, 38

Friedman (Betty) v. U. S. (1962), 151 Ct. Cl. 1, 310 F. 2d 381, cert. denied 373 U. S. 932 25

House v. Mayo (1945), 324 U. S. 42, 65 S. ct. 517, 89 L. Ed. 739 39

Kirby (Lindbergh) v. U. S. (1973), 201 Ct. Cl. 527 .2, 10–13 15–20, 22 25, 28, 29 31, 34, 37 38

Kortz v. Guardian Life Ins. Co. (CA 10, 1944), 144 F. 2d 676, cert. denied 323 U. S. 728 42

Lemly v. U. S. (1948), 109 Ct. Cl. 760, 75 F. Supp. 248 ..... 32, 38

Cases: (Cont'd)

PAGE

S & E Contractors, Inc. v. U. S. (1970), 433 F. 2d 1373, 193 Ct. Cl. 335, reversed in 1972, 406 U. S. 1, 92 S. ct. 741, 1411, 31 L. Ed. 2d 658.....24, 33

Seltzer v. U. S. (1943), 98 Ct. Cl. 554..... 6, 41

Shaw v. U. S. (1966), 174 Ct. Cl. 899, 357 F. 2d 949.. 5

Stevanus v. U. S. (1957), 138 Ct. Cl. 149, 149 F. Supp. 655 24

Taylor's Administrator v. U. S. (1878), 14 Ct. Cl. 339 .....14, 25

U. S. v. Taylor (1881, Oct.), 104 U. S. (14 Otto), 216, 26 L. Ed. 721.....14, 25

U. S. v. Throckmorton (Oct. 1878), 98 U. S. 61, 25 L. Ed. 93 .....14, 19 32, 34

Wehrman v. Conklin (1894), 155 U. S. 314, 15 S. ct. 129, 39 L. Ed. 167.....14, 17, 28

Willcox v. Consolidated Gas Co. (1909), 312 U. S. 19, 53 L. Ed. 382, 29 S. ct. 192, 48 LRA NS 1134..... 35

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF LOWER COURT

These lengthy provisions are contained in an Appendix presented separately from but concurrently with this Petition for Certiorari. References to the pages where each of these provisions is cited or mentioned in the Petition, and to the pages of the Appendix where each of such provisions begins, follow:

United States Constitution

	Pet., page	App.
Art. I, ¶8	5, 26	1
Art. III, Sections 1 (1) and 2 (2)	5, 26	1
Fifth Amendment	5, 15, 27 38, 40	1

United States Statutes

U. S. Code:	Pet., page	App.
10 USC 867 (b-d)	18, note	
10 USC 1331	3, 22, 23, 25	1, 2
10 USC 1331 (b)	16	1
10 USC 1331, 1332	6, 15, 16, 36	1, 2
10 USC 1332	4	2
10 USC 1551	34	
10 USC 1552	4, 6, 34	2
10 USC 8914	10, 15	
28 USC 1346 (a)	5, 18, 21	3
28 USC 1491	5, 7, 21	3
28 USC 1506	21	
28 USC 2411 (b)	5, 34	4
28 USC 2501	5, 7, 10 11, 17, 22	4
28 USC 2516	5, 34	4
38 USC 210	18, note	
50 App. USC 731, 732	5, 42	4, 5

U. S. Statutes at large:

		Pet., page	App.
1916	National Defense Act, 42 Stat. 1033	5	
1941 Dec. 13 (see 50 App. USC 731 732)	55 Stat. 799, 800	5, 42	
1948 June 29 (see 10 USC 1331, 1332)		39	
1952 July 3	66 Stat. 330	5	5
1972 August 29 (see 28 USCA 1491 pock. pt.)	86 Stat. 652	19, 28	

United States Court of Claims

	Pet., page	App.
Rule 37	5	5
Rule 37 (b)	26	5
Rule 38	5	5–7
Rule 38 (b)	26	
Rule 38 (c)	8, 39	
Rule 38 (h)	26	

Text Books

34 Am. Jur. 927, "Mandamus", §150 31

15A CJS 71, "Common Law", §14, t.n. 60 32

81 CJS 591, "Specific Performance", §82 31

Charles Alan Wright, Handbook of the Law of Federal Courts, §16 (1970, 2d ed.) 27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ———

WENDELL P. RYNERSON, - - - *Petitioner*

v.

THE UNITED STATES, - - - *Respondent*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Wendell P. Rynerson, plaintiff in case number 57-71 in the United States Court of Claims prays that the United States Supreme Court issue to said lower court writs of certiorari to review each of the judgment-orders of the United States Court of Claims as follows:

A. the one dated 22 June 1973, dismissing his petition to said court, as to which judgment-order said court on 17 October 1973 denied his motion for a rehearing; and

B. the one dated 11 November 1971, insofar as it rejected his contention that he was not discharged from his reserve commission, as to which judgment-order said court also on 17 October 1973 denied his motion for a trial and/or reconsideration.

OPINIONS BELOW

The lower court has not rendered a reported opinion in *Rynerson* v. *U. S.* However, on 11 May 1973, the lower court rendered an opinion in *Lindbergh Kirby* v. *U. S.*, number 760-71. That opinion, with two dissenting opinions is at pages 15-34 of the Appendix and will be officially reported in 201 Ct. Cl. 527. Unofficially, it may or may not in the future be reported. That opinion is needed, according to page 34 of the Appendix, to ascertain the grounds of the lower court's later dismissing *Rynerson* v. *U. S.*

Unreported administrative action and judicial actions and opinions in or preliminary to *Rynerson* v. *U. S.* are also at pages 7-15 and 34 and 35 of the Appendix.

This material is voluminous consisting of 37 pages, and is separately presented, i.e., is not actually fastened to the Petition for Certiorari (Rule 23(i)). The cover of the Appendix is light blue.

JURISDICTION

The judgment-orders of the United States Court of Claims sought to be reviewed were dated and entered 11 November 1971 and 22 June 1973. An order dated and entered 17 October 1973 denied petitioner Rynerson's timely motions for rehearing and for a trial and/or reconsideration.

Jurisdiction of the Supreme Court is invoked under 28 USC 1255.

QUESTIONS PRESENTED

A. Can the United States Court of Claims dismiss a petition for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

B. Can the Court of Claims refrain from hearing evidence on an issue presented by a petition for money due from the United States under statute, which issue the government never attacked by motion or demurrer, and the facts as to which issue the government did not deny until after the court had decided the issue?

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF THE LOWER COURT

The statutory basis of petitioner's claim below for reserve retirement pay due from the Army was Title 10, U. S. Code. The following sections of it are pertinent:

§ 1331. *Age and service requirements.*

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(3) he performed the last eight years of qualifying service while a member of any category named in section 1332 (a) (1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and

(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

(b) Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of the Treasury, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

(c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

§ 1332. *Computation of years of service in determining entitlement to retired pay.*

(a) Except as provided in subsection (b), for the purpose of determining whether a person is entitled to retired pay under section 1331 of this title, his years of service are computed by adding—

(1) his years of service, before July 1, 1949, in—

(A) the armed forces;

The case also involves inter alia other parts of the United States Code (of Statutes): Title 10, §1552;

Title 28, §§1346 (a), 1491 ¶ 1, 2411 (b), 2501 and 2516; Title 50 App. §§731, 732; United States Statutes at Large, Volume 66, page 330, the United States Court of Claims' Rules 37 and 38, and the United States Constitution, Article 1 §8, Article III §§1 (1) and 2 (2) and the Fifth amendment thereto.

Such provisions are in the aggregate lengthy. Their pertinent texts are in the Appendix, pages 1 through 7.

STATEMENT OF THE CASE

1. *Birth date.* Petitioner was born 28 April, 1905.

2. *Enlistment.* He enlisted in the United States Army Reserve on 22 November 1927.

3. *Continued Reserve Service.* He continued as a member of such reserve in enlisted or commissioned capacities and was last commissioned therein during January 1940 under the National Defense Act of 1916. Such commission was extended to 1952 by an Act of 13 December, 1941 (55 Stat. 799, 800) and by an Act of 3 July, 1952 (66 Stat. 330), unless sooner terminated by the President.

4. *Discharge from Wartime active service.* On 14 October 1945, the Army honorably discharged and released petitioner from continuous active wartime service and duty which had lasted over four years. The armed services could do this either in time of war or peace, for any reason or no reason. *Shaw* v. *U. S.*, (1966), 174 Ct. Cl. 899, 920, 357 F. 2d 949, 963. The Army had paid petitioner to the time of his discharge,

so he had no claim for further active duty or service pay, either rendered or which he might have rendered. *Appel* v. *U. S.*, (1955), 130 Ct. Cl. 688, 128 F. Supp. 153.

5. *Ending of commission not indicated by discharge certificate.* The said discharge was evidenced by a certificate dated 14 October 1945. It did not indicate that petitioner was discharged from his reserve commission.

6. *Discharge in another case specified discharge from commission.* The Army had expressly stated that reserve officer Seltzer was discharged from his commission, according to his case decided in 1943, *Seltzer* v. *U. S.*, 98 Ct. Cl. 554.

7. *Petitioner timely exhausted an administrative remedy permitted by Congress.* Within due time, petitioner applied to the Army Board for Correction of Military Records as permitted in 10 USC 1552, which board without any hearing denied him any relief.

8. *Claim for Retired Reserve Pay.* In 1965, petitioner claimed under 10 USC 1331, 1332, retirement pay from the Department of the Army, effective 1 May 1965.

9. *Army's Denial of Retired pay.* After petitioner had reached age 60, the Department of the Army on 20 May 1965 denied his claim for retired military reserve pay (App. 7, 8) and he has not received any such pay.

10. *When petitioner claimed in Court of Claims, and basis for its federal jurisdiction.* On 25 February 1971, within six years after petitioner reached the re-

quired age of 60, and within six years after he applied for and was denied such retired pay, he filed against the United States, a claim or petition number 57-71 in the United States Court of Claims for such pay. That was the case as to which he now seeks certiorari. The basis for federal jurisdiction in that court was 28 USC 1491 as it stood before 1972, and 10 USC 1331.

11. *What petitioner claimed and did not claim in court.* His petition below asserted two grounds of claim: 1, that his 1945 discharge did not end his reserve commission or service, but 2, that if it did, it was wrongful. He claimed that about $7,000 was due from the government from 1965 to 25 February 1971, but did not request any equitable relief.

12. *First (1971) opinion below on statute of limitations.* In 1971, by motion to dismiss, defendant raised the question of time of accrual of the claim, because of the six year statute of limitations. Defendant had not up to then raised such question by affirmative defense as required by rules 37 and 38 of the Court of Claims.

After that question was briefed, orally argued, and considered by the then full court below, that court on 11 November 1971, rendered a unanimous written opinion that petitioner's claim for retired pay was *not* barred by the statute of limitations since he had filed it in that court within six years after its 1965 accrual. See App. 8-10.

Defendant after its said motion to dismiss, never raised the question of statute of limitations by affirmative defense as required by said rules.

13. *Dictum in same 1971 opinion.* Without any answer of denial by defendant, without any motion by defendant attacking, and without the presentation of any evidence contrary to,* plaintiff-petitioner's first ground of claim, that the 1945 discharge did not affect his reserve commission, for which ground he quoted *Denby* v. *Berry* (1923), 263 U. S. 29, 33, 34, 44 S. Ct. 74, 68 L. Ed. 148, the lower court in said 1971 opinion "rejected" such first ground of claim. Such opinion did not mention *Denby* v. *Berry* nor any other authority as to such ground of claim.

14. *Cause of action not denied was admitted, under Rule 37 (c).* Rule 37 (c) of the court below provided as did court precedents, that allegations in a petition, if not denied, are taken as true.

15. *Court below violated its rule 37 (c).* The court below violated its own Rule 37 (c) and precedents by not taking as true said first ground of the petition, that the discharge of 14 October 1945 did not end petitioner's reserve service or commission.

16. *Referral for trial and trial.* In the same 1971 opinion, the lower court referred ". . . the case . . ." to a ". . . trial commissioner for trial on further appropriate proceedings." Such trial was held in June 1972. The commissioner sought to limit it to the question of the wrongfulness of the discharge (sec-

*Though petitioner believes no record other than his briefs below so shows, he reports: During brief argument shortly before 11 November 1971, one of the judges related that his own discharge as an officer ended *his* commission. This unsworn and unexplained statement from the bench was not subject to cross-examination. It may not have been relevant, but its persuasive effect on the other judges may be imagined.

ond ground of claim). This was due to the court's dictum that it was rejecting the first ground that the discharge did not affect petitioner's reserve commission. The commissioner refused to permit petitioner to introduce evidence to explain his delay in filing a petition with the Court of Claims, the court below.

17. *Commissioner's opinion* (App. 10). On 14 December 1972, the commissioner opined that the petitioner had been denied administrative due process. The commisisoner did not purport to decide any question about the statute of limitations. Without finding that any delay of petitioner had injured the defendant, and though in fact indicating to the contrary (immediately before 6 numbered points), the commissioner recommended dismissal for laches, relying on the first *Cason* opinion (1972), 198 Ct. Cl. 650, 461 F. 2d 784.

18. *Basis of commissioner's opinion undermined.* Said first opinion in *Cason* v. *U. S.* was overruled on 18 January 1973 in an opinion reported in 200 Ct. Cl. 424, 471 F. 2d 1225, in the same case. That court did not thereafter give its commissioner a chance to reconsider his recommendation that Rynerson's claim be dismissed for laches.

19. *Failure to hold hearing on effect of discharge.* The petitioner again drew the lower court's attention to the failure to hold a hearing on his first cause of action, that the discharge did not end his commission. This effort was by his exception 2 to the commissioner's report. The court below has not acted on any excepton to such report, nor, after being duly advised, upon any of the merits of palintiff's petition below.

20. *Change of Judges on Court of Claims.* By January 1973, three new judges had begun to serve on the Court of Claims. They all participated in subsequent rulings on the claims of both *Kirby* and *Rynerson*.

21. *The claims of Lindbergh Kirby.* Late in 1971, Kirby filed a claim number 760-71 in the Court of Claims for both active and retirement pay because of armed force membership. He did not claim any reserve membership. The only factual ground for his claim was the allegation that he had been wrongfully discharged in 1963 from an enlistment which would have lasted to 1967. The additional credit of four years would have completed the 20 years of service required for his retirement. The statutes under which he sued did not require him to attain a certain age. The statute under which he claimed retired pay required him to apply for such pay (10 USC 8914), in order to be entitled to it. Both Kirby and the United States in that case moved for summary judgment.

22. *1973 Kirby opinion on time-bar.* 11 May 1973, one of the three new judges of the court below delivered the opinion in *Kirby* v. *U. S.*, 201 Ct. Cl. 527 (longest item of Appendix). The two other new judges of that court joined in the opinion. Depending entirely upon its view that part of Kirby's claim (the part seeking active duty pay) was time-barred, the opinion sustained defendant's motion for summary judgment and dismissed Kirby's petition.

The majority opinion denying Kirby a recovery, did not mention laches, but cited the 6 year statute of limitations and mentioned stale claims and "public

policy", because Kirby had not sued *in some other court* within six years from the date of his discharge, to establish that it was wrongful. Dissenting Judge Nichols said that the majority was announcing a new rule of law. No opinion was given as to the effect of the statutory requirement that Kirby apply to the armed service for retired pay.

23. *What the parties to Rynerson* v. *U. S. did not seek.* The petitioner Rynerson never in court nor elsewhere claimed pay for active or inactive duty or service for any period after the discharge, 14 October 1945. He has *not* asked any court for reinstatement, mandamus, declaratory judgment nor for any other equitable relief in the premises.

The United States did not move the lower court for summary judgment against Rynerson.

24. *Second opinion below in Rynerson* v. *U. S., on statute of limitations, and accrual of his claim.* Without stating that it was setting aside its decision of 11 November 1971 that petitioner Rynerson was not barred by the statute of limitations, and without stating that it was setting aside its 1971 holding that his claim had not accrued before 1965, the court below on 22 June 1973 dismissed his petition, relying entirely on *Kirby* v. *U. S.*

That case depended entirely on Kirby's failure to sue within six years of his allegedly wrongful discharge; it did not involve Kirby's attaining age 60, nor any other age; unlike Rynerson, Kirby had not questioned the effect of his discharge as ending his

connection with the armed services, since Kirby was not a reservist.

Dismissal of Rynerson's petition on 22 June 1973 and refusing any reconsideration on 17 October 1973 denied Rynerson any claims court remedy for non-payment of retirement pay, whether his discharge was wrongful or not.

Said action and opinion of 22 June 1973 clouded the distinction between *Kirby* and *Rynerson* in several ways:

It failed to cite the statute under which Rynerson claimed, which required him to be 60 years old before he was entitled to retirement pay.

It failed to mention that Rynerson had to be 60 years old before he could sue for retirement pay, and that he had no claim for any other kind of pay.

It failed to show that he was discharged in 1945.

It failed to show that he became 60 years old in 1965.

It failed to show that until 1965 and until after he applied to the army for and was denied retirement pay, he would not know whether he had qualified for retirement nor whether his cause of action had accrued.

It gave the mistaken impression that he had delayed for almost 26 years after accrual and before suing, when in fact he delayed less than 6 years after accrual of his claim. The limitation period was a full 6 years after accrual, not almost 6 years. The court had previously held that accrual was in 1965. It did not give an adequate explanation for contradicting its 1971 holding as to the statute of limitations in Ryner-

son's case, and did not specifically overrule such holdings.

25. *Failure to hold evidentiary hearing on effect of discharge.* In 1973, the petitioner Rynerson, by motion for trial and/or reconsideration, again raised in the lower court the question of the effect of the discharge upon Rynerson's commission. On 17 October 1973, that court overruled that motion without opinion, and has never held a hearing on the evidence as to the effect of Rynerson's discharge.

26. *Amount of Rynerson's claim.* If Rynerson's claim does not already exceed $10,000, it will do so by October 1974.

27. *The Court of Claims' dismissals were final.* The Court of Claims has finally dismissed the petitions there of Kirby and Rynerson; on 17 October 1973, that court denied petitioner Rynerson's motion for a rehearing and his motion for a trial and/or reconsideration (App., last item).

REASONS FOR GRANTING THE WRITS

1. The Court of Claims has decided the following important question of federal law which has not been, but should be, settled by this court:

> Can the United States Court of Claims dismiss a petition for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

2. The Court of Claims has decided federal questions in ways conflicting with the following decisions of this court:

Wehrman v. *Conklin* (1894), 155 U. S. 314, 325, 326, 15 S. Ct. 129, 39 L. Ed. 167; holding that a pure claim for money filed within the statutory period of limitation may not be dismissed on that ground or for laches.

Taylor's Administrator v. *U. S.* (1878), 14 Ct. Cl. 339, 353, affirmed in *U. S.* v. *Taylor* (Oct. 1881), 104 U. S. (14 Otto) 216, 26 L. Ed. 721, where the courts held that a claim against the government for money due under a statute which requires the claimant to file an application with the executive branch, does not accrue until the application is filed with such branch. *U. S.* v. *Throckmorton* (Oct. 1878), 98 U. S. 61, 65, 25 L. Ed. 93, holding that plaintiff may not split his causes of action.

Denby v. *Berry* (1923), 263 U. S. 29, 33, 34, 44 S. Ct. 74, 68 L. Ed. 148 holding that discharge of a reservist does not end his reserve status.

The above (except *Denby* v. *Berry*) supports point A of the petition for certiorari; the following reason, No. 3, and *Denby* v. *Berry* support point B of the petition for certiorari.

3. The Court of Claims has so far departed in *Rynerson* v. *U. S.* from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision under its rule 19-1 (b), end. This is true as to Rynerson's first ground of claim because the lower court rejected it before de-

fendant had denied such facts as required by that court's rules, and notwithstanding various requests, denied plaintiff any hearing on that ground of claim, thus denying him due process guaranteed by the federal Fifth Amendment.

A. The 1973 Decision of the Lower Court Misinterprets the Statute of Limitations and Related Public Policies, Ignores Its Own Rules, and Improperly Gives Retroactive Effect to a New Rule of Law.

NATURE OF THE CASE

Rynerson's case involves inconsistent decisions in the same case on a federal statute of limitations, the anomalous doctrine of laches in a court of law established by Congress, and a complete failure by the trial court to adjudicate another issue, thus denying Fifth Amendment due process.

The case is of large importance to many people for different reasons. It and the *Kirby* case which was the reason for the lower court's dismissing Rynerson's petition, both involve long-time veterans who alleged they were wrongfully discharged and thus denied their rights to non-disability retirement pay.*

Kirby, a regular veteran, claimed under 10 USC 8914. Rynerson, a reservist veteran, claimed under 10 USC 1331, 1332. Both filed in the lower court when it had jurisdiction only to render money judgments.

*Rynerson's other basis for alleging that the government had improperly denied him retirement pay is treated in B, post. That is the ground of claim which the trial court failed entirely to adjudicate.

In deciding against *Kirby,* the lower court cited a later statute passed after he and Rynerson had begun to litigate, and gave it retroactive effect.

In *Kirby,* the lower court laid down a rule that was new, according to dissenting Judge Nichols. As applied to Rynerson's claim, the rule would determine the time of accrual of claims for non-disability retirement without considering the differing conditions precedent prescribed by different statutes. The new rule would make the time of discharge control, regardless of subsequent events required by the entitling statutes.

The biggest difference between the cases of Kirby and Rynerson is that Kirby could properly have applied to the armed service for retirement pay within about 3 years after his honorable discharge, but Rynerson, after his honorable release from active duty, had to wait a period of almost 20 years until he reached the age of 60 before he could properly apply to the armed service for such pay. Rynerson's application, according to 10 USC 1331 (b), "must" have been made to the armed force in which he "last served."

Another important difference is that while Kirby's claim for regular Air Force retirement pay was said to depend on his entitlement to pay for regular *active duty,* Rynerson't claim which was as a reservist only, did not so depend.

The lower court in Kirby announced the new rule which it indiscriminately followed in *Rynerson,* that it would not act on cases of illegal discharge filed more than six years after such discharge, unless the plain-

tiff had first established the illegality in some other court. The lower court held that this should have been done by actions of equitable nature such as mandamus or declaratory judgment.

The majority in *Kirby* ignored the expense and inconvenience to that plaintiff and others like Rynerson who were similarly situated, which the new rule would prevent from being remedied. Yet Rynerson had been through a trial on the merits and various other steps, before and after the Kirby decision.

By denying Kirby and Rynerson a decision on the merits, the claims court discouraged veterans of the armed services, and other federal personnel having comparatively small claims, from going to that court, and discouraged them from relying on the full 6-year period of limitations. Yet that court in *Cason* v. *U. S.* (1973), 200 Ct. Cl. 424, 471 F. 2d 1225 and the Supreme Court in *Wehrman* v. *Conklin* (1894), 155 U. S. 314, 325, 326, 15 S. Ct. 129, 133, c. 2, 39 L. Ed. 167 recognized that a pure action for money can be filed in court up to the last day or month of the allowed period of limitation, and that a plaintiff who seeks only money and who so delays, is not barred by his mere delay from maintaining such a claim.

Since 1945, members of the armed forces, other federal personnel, and those employed under private pension plans have been more numerous than they were before World War II. Many of them retire after 30 years. The crop of retirees or applicants may peak about 1975. The case will be a timely precedent for those whose rights depend on reaching an age such as

60, be they veterans of the armed services, the civil service, or merely of labor.

Unless the case of Kirby or the case of Rynerson is reversed, it can harm some of the classes trained in violence and in group action. Too little regard for their rights and the process of law due them could threaten our domestic tranquility, practicularly in times of unemployment, and, eventually, our national defense.

Petitioner Rynerson's claim against the United States will soon amount to more than $10,000, if it does not already. A judgment against the United States in federal district court cannot exceed that amount (28 USC 1346 (a) (2)). Thus, the Court of Claims will be or has been his only clear judicial avenue to full justice. The decision below closes that route for his escape from injustice.*

The decision below would require petitioner to resort first to a suit for mandamus, reinstatement or declaratory judgment. It would thus require him to risk the devious and hazardous backroads of collateral litigation. Congress has not evinced an intention to so discommode him.

The lower court decision usurps Supreme Court power to supervise lower courts, mentioned in this court's rule 19-1 (b), end. It was also unseemly for the Court of Claims to pass the buck to some other trial court.

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*Neither the Court of Military Appeals nor the Veterans Administration has jurisdiction over claims for such retirement pay (10 USC 867(b-d); 38 USC 210).

The Kirby case invites all similarly situated plaintiffs in the Court of Claims and possibly in federal district courts, to split their causes of action, whether their claims amount to more or less than $10,000.

Splitting a cause of action increases litigation and a policy of the law based on two maxims therefore forbids it. *U. S.* v. *Throckmorton* (Oct. 1878 term), 98 U. S. 61, 65, 25 L. Ed. 93. Yet the lower court threatens plaintiffs that laches may bar them *if they do not* split their causes of action.

In denying Kirby relief, the lower court cited the 1972 amendment to 28 USC 1491. According to that court, Rynerson's claim is so intertwined with Kirby's issues that in Rynerson's opinion, the Supreme Court should consider such amendment in deciding whether to grant certiorari on the petition here.

There is great public interest at this time when Congress has just *enlarged* the powers of the Court of Claims, that such court *not* be permitted to *shrink* its own powers, as it did in *Kirby,* followed in *Rynerson.* Any actual or supposed adaptation to that court's new powers is currently important, and probably will be for a long period in the future.

This case also involves a number of other important and fairly included legal questions: the functioning of an unique federal court; that court's usurping Congressional power to limit its jurisdiction, and non-use of its own power.

STATUTE OF LIMITATIONS

Can the United States Court of Claims dismiss a petititon for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

This question should be answered negatively.

The Court of Claims dismissed the petititons of Kirby and Rynerson who both sought retirement pay, because they had failed to assert some narrower cause of action in some other "appropriate" court. In ordering dismissal for this reason, the claims court exercised a discretion which Congress had not given.

The narrower actions which the claims court said Kirby (and indicated Rynerson) should have brought were called in part ". . . reinstatement, mandamus, (and) declaratory judgment . . .". Another action was mentioned which Kirby could have brought with some possibility of success, but Rynerson would certainly have failed in it. This was an action for "active duty back pay". Rynerson, being a reservist, had no right to be paid after he was relieved from active duty. *Appel, et al., supra.*

No statute gave the Court of Claims discretion to limit its own jurisdiction over any class of cases. No statute gave that court the power to require plaintiffs to have asserted some narrower cause of action in some other court. No statute gave that court power to dismiss cases of plaintiffs who have failed to assert some narrower cause of action in some other court.

District courts and the Court of Claims have concurrent jurisdiction over money claims against the United States which are based on statute and contract up to $10,000 (28 USC 1346 (a) (2) and 1491). Therefore, petitioner's claim has never been within the exclusive jurisdiction of the district courts, and the Court of Claims could not have transferred his petition for money judgment to a district court under 28 USC 1506. 28 USC 1491 gave the Court of Claims jurisdiction.

When a court is given jurisdiction of a class of cases, and no discretion to refuse to act, it has no right to decline to exercise such jurisdiction. *Cohens* v. *Virginia,* (1821, Chief Justice Marshall), 6 Wheat. 264 at 404, 19 U. S. 82 at 100, 5 L. Ed. 527; *England* v. *Louisiana State Board of Medical Examiners* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, headnote 1, 84 S. Ct. 461.

The Court of Claims had "jurisdiction" of the subject matter of plaintiff's claim which, in the language of 28 USC 1491, was "against the United States founded . . . upon . . . Act of Congress, . . .". In 1971, the lower court exercised that jurisdiction by ordering a trial before a commissioner; in 1972, it further exercised that jurisdiction by holding such a trial, on one ground of claim.

The defendant in Rynerson's case did not raise the statute of limitations as an affirmative defense, though the rules of the Court of Claims so required.* That

*Defendant vaguely presented the affirmative defense of laches.

court nevertheless passed upon the statute of limitations. Since that question may purport to be the reason for the lower court's dismissing plaintiff's claim, petitioner next considers it.

A question fairly comprised in question A is:

May plaintiff-petitioner maintain an action only for statutory military reserve retirement pay brought in the Court of Claims within six years after reaching age 60, within six years after applying to the armed service for that pay, and within six years of being denied it, when that age and application were conditions precedent set by statute, when six years was the period allowed by the statute of limitations for bringing claims for money in that court, and when that court had power only to render judgment for money claims?

The statute of limitations says that a claim in that court

> ". . . shall be barred unless *the petition thereon* is filed within six years after *such* claim first accrues." (italics supplied 28 USC 2501)

Rynerson's ground of claim, or cause of action, in every aspect, depended by statute on his reaching age 60 (10 USC 1331). Kirby's claim depended on a different section of the statutes, which did not involve that time question, nor any age requirement. His section only required that he have completed 20 years of service and have applied for retirement pay. Yet the Court of Claims made Rynerson's claim depend entirely on the Kirby opinion.

Any intimation that Rynerson's claim accrued before 1965 when he became 60 years old flew in the face of a decision to the contrary which Congress had expressed in 10 USC 1331. That section required reservists to apply to the armed service before they would be entitled to retired pay. The requirement that an application be made, coupled with the age requirement in the same section, prevented the armed service from granting retirement pay to a reservist such as Rynerson, until he had reached age 60 and applied for the pay. Thus Congress required Rynerson to wait until 1965 before suing for retirement pay, and criticism or loss of rights or remedies for so waiting should not be visited upon him.

Until Rynerson actually reached age 60, he had no reason to believe that he was entitled to apply for retirement pay. Until then, he was quite uncertain that he could meet the age requirement of living to age 60. He reached it in 1965. Before then, and before application to the armed services and denial of the pay, any action by him for declaratory judgment or mandamus or reinstatement or a money claim would have been premature, immature, unripe, speculative, rash, precipitous, moot, vexatious and wasteful of both the parties' and the court's time and money.

Until 1965, Rynerson's claim was only incipient, and had not accrued. If he had died before then, no claim could have logically been filed on his behalf.

The cause of Rynerson's action was the government's 1965 breach of its statutory obligation to pay him for retirement. Nothing accelerated the accrual

of that cause of action. So, Rynerson had six years from 1965 in which to sue. He did sue within six years, namely, in 1971. Only another *statute* passed before he sued could have even purported to bar his action. No such statute has been passed.

If Congress thinks any section or combination of the statutes allows too much time in which plaintiffs can sue, or unduly burdens the claims court, *Congress* can amend or supplement them. As stated at the end of the last *Kirby* dissent, the Court of Claims should not do the legislature's work.

> "For courts to interpret statutes in such a way as to extend, limit, modify or alter in any way the manifest intent of the legislature, amounts, in my view, to a clear usurpation of the legislative function."

Dissent of Judge Collins in *S & E Contractors, Inc.* v. *U. S.* (1970), 433 F. 2d 1373 at 1393, c. 1, 2, 193 Ct. Cl. 335, 372, which was reversed in 1972, 406 U. S. 1 at 21, 92 S. Ct. 741, 1411, 31 L. Ed. 2d 658.

The plaintiff "cannot with honesty, make the necessary allegations to support an action . . . until the administrative process is completed . . .". *Crown Coat Front Co.* v. *U. S.* (1967), 386 U. S. 503 at 511 and 515, 87 S. Ct. 1177, 18 L. Ed. 2d 256, a case originating in the Court of Claims and involving the statute of limitations. The administrative process was only complete when the government refused to pay.

In *Stevanus* v. *U. S.* (1957), 138 Ct. Cl. 149, 149 F. Supp. 655, the unanimous opinion quoted from the

same retirement statute as that on which petitioner relies, 10 USC 1331, italicized the words "upon application", and asked the question:

What events fixed the liability?

The court said that the answer was obvious:

> ". . . plaintiff was not entitled to anything until he filed his application . . ." and that ". . . the wrong was committed . . . when defendant denied plaintiff the retired pay . . .".

Long ago, the lower court held in *Taylor's Administrator* v. *U. S., supra,* and this court upheld that decision in *U. S.* v. *Taylor, supra,* that the statute of limitations does not begin to run until the government refuses to pay the money.

Even if Kirby's claim for *active duty* pay accrued all at once when he was discharged (p. 3, slip op.), Rynerson had no claim for active duty pay, and his claim for retirement pay, unlike Kirby's, had to wait until he was 60 years old.

As stated by Judge Davis of the Court of Claims, dissenting in part from *Kirby.*

> "This limitations problem has occasioned much deliberation, . . .".

His statement is true not only of the *Kirby* case, but of many other limitation and related cases in that court. See for example, Judge Davis' lengthy opinion in *Betty Friedman* v. *U. S.* (1962), 159 Ct. Cl. 1, 310 F. 2d 381, cert. denied, 373 U. S. 932, involving disability retirement pay.

The Court of Claims erred in exercising oversight of a legislative nature as to the jurisdiction of other inferior courts, which Congress is authorized by Articles I and III of the federal constitution to exercise, and which Congress has sought to exercise by establishing courts' jurisdictions in statutes. This exercise was by the Court of Claims under the gise of construing its own statute of limitations, which was never intended to affect the jurisdiction of the district courts, nor to increase their burdens.

Fairly comprised within the first question presented, is the following:

Can a court properly dispose of a case on an issue not presented under its own rules?

The Court of Claims in its 1973 ruling against petitioner Rynerson as to the statute of limitations, deviated from its own rules:

Rule 37 (b), requiring the statute of limitations to be set forth affirmatively as a defense, if it is to be considered.

Rule 38 (b) requiring all defenses, in law or fact to a claim, to ". . . be asserted in the responsive pleading thereto . . ." except that certain defenses not here material, could be presented by motion.

Rule 38 (h) providing that a party waives all defenses not properly presented. (Even if the petition had been filed more than six years after the cause accrued, that would not deprive the lower court of jurisdiction of the subject matter.)

Yet in 1973, the lower court dismissed the petition on an issue not presented under its own rules, namely, the issue of the statute of limitations. The government presented that point only by motion to dismiss Rynerson's case.

The rules of the lower court as to pleading clearly delineates part of the "process" which is "due" a litigant. If the court before making rules had power to consider limitation of actions on the court's own motion, the court by making those rules, gave up that power, when the question was raised only by motion to dismiss.

Court rules are no less to be followed than the regulations of administrative agencies. By not following its own rules, the lower court denied Rynerson due process, contrary to the Fifth Amendment.

The Court of Claims' 1971 decision was that Rynerson's claim was not barred by the statute of limitations. If that statute is jurisdictional, then the court decided at that time that it had jurisdiction, or the right to decide the merits, of the case.

Res judicata exhausted the lower court's power to decide its own jurisdiction in Rynerson's case. After a court has decided that it has jurisdiction, it should stick by the decision.

> "The finding of jurisdiction is considered to be res judicata of the issue." (of whether there is jurisdiction). Professor Charles Alan Wright, *Handbook of the Law of Federal Courts* (West Pub. Co. 2d ed., 1970), page 50, §16, "Jurisdiction to determine jurisdiction."

So the 1973 decision by the Court of Claims against Rynerson, based on the time bar, was erroneous for this reason as well as on the merits.

LACHES

The majority opinion in *Kirby* v. *U. S.*, did not mention laches but mentioned some of its elements.

There are three clear differences between the defenses of laches and limitation.

One defense (limitation) is statutory, but the other (laches) is not.

One defense (laches) requires prejudice to defendant, but the other (limitation) does not.

Limitation requires a specific length of time; laches does not.

Until 1972, all actions in the Court of Claims were actions for the recovery of money alone. Rynerson and Kirby had already filed there in 1971. Rynerson never sought anything but a money judgment.

An action for recovery of a money judgment "is one at law". *Wehrman* v. *Conklin* (1894), 155 U. S. 314 at 325, 15 S. Ct. 129, 133, c. 2, 39 L. Ed. 167. On page 326, the court said:

> "Though a good defense in equity, laches is no defense at law, if the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after a lapse of 19 years

and 11 months, he is as much entitled as matter of law to maintain it, as though he had brought it the day after his . . ." claim accrued.

So the Court of Claims, in deciding a case where only a money judgment is sought, has no power to dismiss for laches. There is thus conflict between the Supreme Court and the Court of Claims about applying laches to pure money claims.

In refusing to consider the merits of petitioner's claim for money, the Court of Claims relied on possible but unproved facts appropriate only in defending on the ground of laches, against a claim for equitable relief. Since petitioner Rynerson had not sought equitable relief in his petition filed in 1971 in the Court of Claims, and never did seek such relief, it is inappropriate to dismiss his claim, if the dismissal is based only on his delay for a period less than the statute of limitations.

Even if the Court of Claims had power to dismiss for laches, it could not properly deny relief to any plaintiff without considering whether his delay in suing *actually* prejudiced defendant.

Though the majority opinion in *Kirby* v. *U. S.* does not even mention laches, its penultimate paragraph does bring in delay, "public policy" and *possible* prejudice to the government, in its contesting stale claims generally.

Judge Davis, in dissenting, said that laches on Kirby's part was not shown as there did not appear to have been prejudice to the government (p. 14). Judge

Nichols, in dissent, at page 17, agreed with Judge Davis on this, and at page 16 indicated that the defense of laches was "anomalous". The majority only said there "can be" prejudice in cases of stale claims (near end).

The commissioner in Rynerson's case indicated that there was no evidence of prejudice to the government from Rynerson's delay. (p. 8 of his opinion).

The Court of Claims' recent vacillation on whether to apply laches is another example of the need for Supreme Court review where the time of accrual of claims is involved. *Cason* v. *U. S.* (Jan. 1973), 200 Ct. Cl. 424, 471 F. 2d 1225, vacating its 1972 judgment in the same case, 198 Ct. Cl. 650, 461 F. 2d 784. *Cason* waited until one day before the six years were up. His delay did not appear to prejudice the government and he was given judgment.

Through the doctrine of laches, the United States Court of Claims has for years intermittently and sometimes apparently at its mere whim, been defeating the Congressional will expressed in the statute of limitations. Congress there fixed a period of six years in which to sue the government. Yet the Court of Claims in one case, held that a delay of only 11 months constituted a defense. *Alpert* v. *U. S.* (1963), 161 Ct. Cl. 810.

While we are on the subject of equitable defenses, it is appropriate to recall the maxim that a party who seeks equity must do equity. The principle should apply to a court which seeks to require a party to invoke equitable remedies. Yet the Court of Claims' require-

ment that plaintiffs seek one or more equitable remedies before suing for money would not do equity.

The requirement would drive plaintiffs to seek remedies which would probably be illusory and futile. They are the remedies described as reinstatement, mandamus and declaratory judgment.

"Reinstatement" would amount to specific performance of a contract for personal service, a remedy not granted (*81 C.J.S.* 591, §82 of Specific Performance).

Reinstatement would have to be sought by mandamus. In a situation where the judgment of the executive is involved, mandamus was not generally available. *34 Am. Jur. 927,* §150 of Mandamus, t. n. 9 and 10.

An action for declaratory judgment has not been held to be obligatory. Even if it were obligatory, it would be so only if there were a *matured* controversy. Rynerson's controversy was not mature until 1965, because he had not matured to the age of 60.

OTHER PUBLIC POLICIES

But the Court of Claims here has flouted more than a principle of equity, more than acts of Congress, and more than the doctrine of separation of powers announced in the constitutional provisions cited.

The *Kirby* decision required that plaintiff convince some court of general jurisdiction that he was entitled to credit for service enough to total 20 years. It required that he *convince* such other court *before* he came to the Court of Claims (pp. 4-11, slip op.).

Thus, the *Kirby* case stirred up and added a burden of litigation which was previously unnecessary to collect disputed pay.

The lower court's majority finally mentioned that public policy is against stale claims. However, that public policy is frequently outweighed by other, more compelling public policies:* Some are that justice should be done by the ordinary remedy at law, money judgment, if requested and if possible, that a cause of action should not be split (*U. S.* v. *Throckmorton*, hereinafter quoted), that litigation not be encouraged to proliferate unnecessarily, that there be an end to it (15 A CJS 71, Sec. 14 of Common Law, t.n. 60), and that former servicemen should be liberally treated under retirement statutes (*Lemly* v. *U. S.* (1948), 109 Ct. Cl. 760, 75 F. Supp. 248, end).

Shuttling or shuffling the parties between ". . . tribunals is a sure way of defeating the ends of justice." Concurring opinion of Justice Douglas in *England* v. *Louisiana State Board of Medical Examiners*, *supra*, at p. 495, of his opinion.

If this case had been filed in district court and that court had wanted to transfer it to the Court of Claims because of the latter's superior expertise in handling claims against the government, the transfer would have been somewhat plausible; but this is a case where the court of superior expertise, the Court of Claims, seeks to throw the plaintiff into the general litigation of a district court which is *less* expert than the Court of Claims as to government claims. From the standpoint

*Belton v. Trayner (C.A. Va. 1967), 381 F. 2d 82, 87.

of justice as a whole, the action of the Court of Claims has not even been expedient.

To require two lawsuits where only one grew before, protracts litigation.

> ". . . protracted . . . litigation has never been known for . . . beneficial effect on contract performance."

Dissent of Judge Collins in *S & E Contractors, Inc.* v. *U. S.*, 433 F. 2d 1373 at 1398, c. 2, 193 Ct. Cl. 335, which was reversed in 1972, 406 U. S. 1, at 21, 92 S. Ct. 741, 31 L. Ed. 2d 658.

The same is true as to performance of statutory duties.

Kirby required a preliminary action either for mandamus, reinstatement or declaratory judgment. If a plaintiff successively tried these remedies in some other court, and failed, there would be four times the amount of litigation and resulting harassment to courts and parties; four times that involved in a single action in the Court of Claims. Success in one of the 3 preliminary lawsuits still would not give plaintiff a judgment for a definite amount of money. So, *Kirby* violates the established policy of the law against splitting actions, which is stated as follows:

> "There are no maxims of law more firmly established or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; . . ."

U. S. v. *Throckmorton* (Oct. 1878), 98 U. S. 61, 65, 25 L. Ed. 93.

Now, when the courts are increasingly crowded, is no time to drop the rule against splitting causes of action. It would be poor judicial administration to fail to insist that the rule be followed.

The government would be further disadvantaged by petitioner's suing in district court, for if he were diverted to that court and finally got a money judgment there, interest would have to be allowed (28 USC 2411 (b)), whereas in the Court of Claims, he would not initially be awarded interest since no statute or contract sued on provided for it (28 USC 2516).

Kirby and Rynerson resorted to Correction Boards (mentioned in 10 USC 1551, 1552 and in Kirby at p. 3, slip opinion). Their purpose was to get their records corrected administratively and thus avoid all court litigation. Resort to such boards was optional; no statute required it, nor did any statute require that any judicial remedy be sought before suing in the Court of Claims. The *Kirby* opinion erred in requiring them to repeat their efforts in a court other than the Court of Claims. It was a judicial declaration of a doubtful public policy. Even if it were a good public policy, a court is not the place, and after litigation has started is not the time, to spring it upon a plaintiff. This is especially so when the entire field of the litigation is otherwise statutory.

The Court of Claims erred in exercising supervision over other inferior federal courts partly coordinate to the Court of Claims, and inferior to the Su-

preme Court, as mentioned in the latter court's rule 19, § 1 (b), last line.

It is fitting that this court speak the last word on the public policies involved here. Mere silence by this court would not suffice to avoid the effects of the lower court's continued floundering on the matter of time-bars.

Rynerson chose to litigate in the Court of Claims. According to that court's unanimous decision in 1971, he had made a proper choice. A plaintiff cannot be forbidden to try the facts upon which his right to relief is based "before a court of his own choice, . . ." if the court he selects has jurisdiction of cases such as his. *Willcox* v. *Consolidated Gas Company* (1909), 212 U. S. 19, 40, 53 L. Ed. 382, 29 S. Ct. 192, 195, 48 LRA NS 1134; *England* v. *Lousiana State Board of Medical Examiners,* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, beginning of majority opinion and at Douglas' concurring opinion.

Rynerson had a trial before a commissioner. The Court of Claims should have decided his case on the merits, if it was not time barred.

RETROACTIVE EFFECT OF NEW RULE OF LAW WAS IMPROPER

Fairly comprised within the first question presented in this case, is the following:

When a statutory obligation of the government depends on a plaintiff's reaching age 60, can a court retroactively after he reaches it, require that he have

litigated other related facts in anticipation of his so surviving?

In 1971, the Court of Claims issued its solemn and unanimous ruling by experienced judges, that Rynerson was entitled to a decision on the merits of half of his grounds: i. e. that he was entitled to a decision on whether his discharge was wrongful.

In 1972, the court, through a commissioner, held a hearing on that part of Rynerson's claim.

In 1973 the Court of Claims legislatively (illegally) and retroactively abolished the remedy which in 1971 it had declared available to petitioner. Judge Nichols' *Kirby* dissent, p. 14, end, said this was a new rule.

A statute purporting to bar a plaintiff's suit, such as Kirby's or Rynerson's, would have been retroactive. A retroactive statute could not have constitutionally justified dismissal of his suit. A retroactive statute would have deprived him of due process. A retroactive court decision should not accomplish more. Yet, *Kirby* would do so.

The lower court, by causing Rynerson's remedy to fail, also caused his right to fail. Thus, in effect, the court in 1973 abolished an obligation of the government, created by its own statute (10 USC 1331, 1332) which was valid in 1971 and would otherwise be still valid, and abolished any obligation of implied contract arising by virtue of the same facts. Hence, the 1973 decisions of the Court of Claims deprived petitioner of property without due process of law.

The 1973 decision against the petitioner did not mention the facts that he had spent time and money

in prosecuting his claim to trial before 1973. On the other hand, Kirby's case was decided by summary judgment without a trial. He presumably spent less money in prosecuting his claim than Rynerson did in his trial and other steps. Kirby's claim was filed in October 1971, after Rynerson's (p. 1, Kirby slip. op.).

The new rule announced in *Kirby* v. *U. S.* was not confined in its operation to future cases arising from fact situations which might occur after such announcement. Such a confinement would have avoided prejudice to Kirby and to Rynerson and others similarly situated.

Instead, the majority opinion retroactively applied the new rule not only to Kirby, but, without saying so, applied it also to others similarly situated on 11 May 1973, the date *Kirby* v. *U. S.* was announced or published. One of the class affected was petitioner Rynerson. In fact, the lower court's decision of June 1973 in *Rynerson* v. *U. S.* specifically applied the *Kirby* rule to Rynerson.

Since *Rynerson* v. *U. S.* had not on 11 May 1973 become final, the lower court on that date and later could easily have declared in his case that the new Kirby rule was inapplicable to Rynerson, at least, and could as easily have extended the exemption to others situated similarly to Rynerson. As elsewhere shown, distinctions aplenty existed between Kirby and Rynerson.

Dissenting Judge Davis asserted that *Kirby* was inconsistent with the 1971 *Rynerson* opinion as to time-bar (Kirby, p. 11, note, and p. 12). Another dissent

indicated the same, referring to Rynerson as Anonymous.

After a court has long remedied wrongful discharges and denials of retirement pay,* by money judgments, without requiring plaintiffs to resort to some other court first, the chosen claims court's refusal to follow its accustomed procedure, and its insistence that plaintiffs test their money claims elsewhere first, is a literal denial of Fifth Amendment due process. The old process, efficient for plaintiffs, should not be changed during litigation, as it was for Kirby and Rynerson, to a less efficient process which would require two, three or four suits instead of one. To make a change pendente lite is a wide departure from the accepted and usual procedure, so wide that the Supreme Court should intervene by certiorari.

This court has declined to give retroactive effect to its ruling in a civil case. *England* v. *Louisiana State Board of Medical Examiners* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, at end. A new rule of law announced by a trial court in a civil case should not have retroactive effect either.

B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action.

Can the Court of Claims refrain from hearing evidence on an issue presented by a petition for money due from the United States under statute, which issue the government never attacked by motion or demurrer,

Lemly v. *US* (1948), 109 Ct. Cl. 760, 763, 75 F. Supp. 248.

and the facts as to which issue the government did not deny until after the court had decided the issue?

The reserve retirement pay law on which Rynerson relies was enacted 29 June 1948. (History of 10 USC 1331, 1332). Before that time, according to his petition below (¶¶ 3 & 4), the Army had not determined that he had ceased to be a reservist. If he had not ceased to be a reservist, before 1947, he remained one for twenty years from his first membership, 1927. Therefore, but for one condition, reaching age 60, his incipient right to retirement pay vested when the law was passed in 1948. Of course, a mere incipient right is not an accrued right.

The lower court has departed from the usual course by not deciding after hearing evidence, whether he was discharged from the reserve in 1945. In 1971, it had departed from the usual course by deciding this issue before hearing evidence, and before the defendant had denied any part of Rynerson's petition, at a time when, under its Rule 38 (c), the lower court should have been assuming his petition to be true. See also *House* v. *Mayo* (1945), 324 U. S. 42, 45, 65 S. Ct. 517, 520, 89 L. Ed. 739; *Diamond* v. *U. S.* (1970), 192 Ct. Cl. 502, 509, 427 F. 2d 1246, note 11.

The lower court on 11 November 1971, ruled against petitioner Rynerson on the effect of the discharge and held that he had been discharged from the reserve on 14 October 1945. There having been no evidentiary hearing on that issue, the ruling was mere dictum. Persistence in following this dictum denied plaintiff

a hearing on that issue, and therefore denied him due process of law.

Also on 11 November 1971, the court ordered a commissioner to hear evidence. He construed this order to mean that he should hear evidence only on the other issue, as to whether such discharge was wrongful. In the hearing, he tried to limit the evidence to that point. His opinion did not consider the first ground of claim, that the petitioner's commission was not ended by the 1945 discharge. Plaintiff-petitioner excepted to the omission to hold an evidentiary hearing on that issue.

In 1973, the court, without deciding the merits of *either* of plaintiff's grounds of claim, ordered dismissal of the entire petition because of the time-bar, citing only *Kirby* v. *U. S.* Then the court denied plaintiff's motion for a trial on and/or reconsideration of the question of whether plaintiff was discharged from the reserve. This was a final denial of due process for plaintiff on the first ground of his claim. Those refusals emphasized an additional difference between the claims of Rynerson and Kirby. Kirby did not have a reserve commission or membership, and so did not and could not, present a like issue, as to the *effect* of his discharge, which was from the *regular* Air Force. Kirby thus could only assert, as he did, that his discharge was wrongful. The persistence of reserve membership was not involved in *Kirby* v. *U. S.*

What would have been the effect of finding for Rynerson that his 1945 discharge from active duty did

not discharge him from the reserve? It would have been that his reserve membership continued until at least 1947, when his 20 years of reserve service were therefore completed. Such a favorable finding would have obviated the need to decide the far more complicated issue of wrongful discharge.

If this court agrees that time did not bar the petition below, this court should grant certiorari also because of the lower court's denial of a hearing as to the effect of the discharge. That was a denial of due process as to such issue.

A right of action or claim is property and the law is clear that the discharge of a reservist from active duty does not end his commission. *Denby* v. *Berry,* post. The court below did not mention that case in any opinion or judgment in Rynerson's case, though he cited it to such court. Naturally it was not cited in the Kirby case, since Kirby was not a reservist.

When the Army has wanted to discharge an officer from his reserve commission, it has specified that the discharge was "from his commission". *Seltzer* v. *U. S.* (1943), 98 Ct. Cl. 554.

As Chief Justice Taft wrote for a unanimous court, concerning a commission in the naval reserve:

> ". . . members of this force occupied two statuses, one that of inactive duty, and the other of active service" (p. 33).
>
> The Navy "did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation de-

> tached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy" (p. 34).

Denby v. *Berry* (1923), 263 U. S. 29, 44 S. Ct. 74, 68 L. Ed. 148.

A condition once existing, such as a status or office held, is presumed to continue. The burden is on one asserting the contrary of a presumption, to rebut the presumption by evidence. *Kortz* v. *Guardian Life Ins. Co.* (CA 10, 1944), 144 F. 2d 676, 678, cert. denied 323 U. S. 728. Yet the 1971 dictum, without the defendant's introducing any evidence, overruled the presumption that plaintiff's commission continued in force after 1945, and until 1947.

The defendant did not move for summary judgment as to any part of plaintiff's petition below. Before the 1971 dictum, defendant did not even cast doubt on the presumption by denying it in any pleading, and the lower court did not require the parties to introduce evidence in any trial as to the effect of the 1945 discharge.

There is another reason for distinguishing Rynerson's case from Kirby's. Rynerson's 20 years of service were partly attained by a statute which in effect extended past 1947 his membership in the armed service reserve (55 Stat. 799), unless the President sooner ended it. No statute of similar purport extended the creditable time served by Kirby.

CONCLUSION

The United States Court of Claims misdecided a new and important question of federal law, decided four federal questions in ways conflicting with decisions of this court, and far departed from the accepted and usual course of judicial proceedings. These grounds for certiorari are summarized at the beginning of REASONS FOR GRANTING THE WRITS.

These lower court errors involved others discussed under NATURE OF THE CASE, such as the lower court's abuse of judicial power by retroactive judicial legislation and otherwise, thus enlarging technical and anomalous time-bars, and that court's non-use of its power to hear and decide the merits of a money claim against the United States based on statute benefiting reservist veterans, are believed to require writs of certioari.

Respectfully submitted,

WENDELL P. RYNERSON
403 E. Second Street,
Madison, Indiana 47250

Petitioner and attorney for himself

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No. 73-1084

IN THE SUPREME COURT

OF THE

UNITED STATES

.....

_____ 197__

WENDELL P. RYNERSON, Petitioner

v.

THE UNITED STATES, Respondent

APPENDIX

TO

PETITION FOR WRITS OF CERTIORARI

TO THE UNITED STATES COURT OF CLAIMS

.....

Wendell P. Rynerson,
403 E. Second Street,
Madison, Indiana 47250, Petitioner
and Attorney for himself.
812 265 4699

INDEX OF SUBJECT MATTER AND TABLE OF STATUTES etc. IN APPENDIX

		App.
United States Constitution's:		1
Article I, Par. 8,	Power of Congress	1
Art. III, Secs. 1 (1) & 2 (2)	Powers of Courts	1
Amendment V	Due Process	1
United States Statutes:		
10 USC 1331, 1332	Reserve Military Retired Pay	1,2
10 USC 1552	Boards for Correcting Military Records	2
28 USC 1346 (a)	District Courts limited to $10,000 judgments on claims against U.S.	3
28 USC 1491	Claims Court jurisdiction	3
28 USC 2411 (b)	Interest allowed on District Courts' Judgments against United States	4
28 USC 2501	Statute of Limitations in Court of Claims	4
28 USC 2516	Interest not initially allowed on Court of Claims' Judgments against United States	4,
50 App. USC 731, 732	Wartime extension of reserve memberships	4,5
66 Stat. 330	End of World War II was 1952	5

United States Court of Claims':

Rule 37	Effect of failure to deny petition	5
Rule 38	Defenses — how presented	5-7

Adverse Administrative Action:

Army's letter of 20 May 1965	Denying liability	7,8

Court of Claims' Actions & Opinions

Judgment-order of 11 November 1971, rejecting First Ground of Rynerson's Claim (ineffectiveness of his discharge), and denying application of Statute of Limitations, and ordering trial on Second Ground of Rynerson's Claim (that his discharge was wrongful)	8-10
Commissioner's Opinion, 14 Dec. 1972, sustaining wrongfulness of discharge but recommending dismissal for time bar	10-15
Opinion, Kirby vs US, 11 May 1973, dismissing Kirby's petition as time-barred	15-34
Judgment-order, dismissing Rynerson vs US, 22 June 1973, relying solely on Kirby vs US	34,35
Order, 17 Oct. 1973, denying Rynerson's motion for a rehearing as to the judgment-order of 22 June 1973, and denying Rynerson's motion for a trial and-or reconsideration as to the judgment-order of 11 Nov. 1971 insofar as it rejected his first ground of claim, (the ineffectiveness of the 1945 discharge to end his reserve commission)	35-37

APPENDIX

Article I, United States Constitution:
Section 8. The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court;
United States Code (1964), volume 1, page xliii

ARTICLE III, United States Constitution:
Section 1. (1) The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . US Code, (1964), vol. 1, p. xliv
Section 2 (2). . .the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
United States Code (1964), volume 1, page xlv

Amendment V of the Constitution of the United States:
No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
US Code, 1964 Ed — Vol 1, page xlvi

Statutes

10 U.S.C 1331

(a) Except as provided in subsection (c), a person is entitled, upon application, to retire pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(b) Application for retired pay under this section must be made to the Secretary of the military department, . . . having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

Volume 2, US Code (1964), page 1222;
70A Stat. 102, Aug. 10, 1956, ch. 1041

10 U.S.C. 1332

1332. Computation of years of service in determining entitlement to retired pay.

(a) (F) or the purpose of determining whether a person is entitled to retired pay under section 1331 of this title, his years of service are computed by adding —

(1) his years of service, before July 1, 1949, in—

(A) the armed forces;

(2) each one-year period, after July 1, 1949, in which he has been credited with at least 50 points on the following basis:

(A) one point for each day of —

(i) active service; or

(ii) full-time service . . .

Volume 2, US Code (1964), page 1223;
70A Stat. 102, Aug. 10, 1956, ch. 1041;
Sep. 2, 1958, Pub. L. 85-861, Sec. 33 (a) (9), 72 Stat. 1565

Title 10, US Code, (1964), Vol. 2, page 1247, Sec 1552 70A Stat. 116, Aug. 10, 1956, Ch. 1041:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . .

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961. . . .

28 United States Code, Vol. 7, pages 5969, 5970, Section 1346 (a): 1964 edition,
The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(June 25, 1948, ch. 646, 62 Stat. 933; Aug. 30, 1964 (pub. L. 88-519, 78 Stat. 699).

United States Code, 1964 Edition, Volume 7, page 5985:
Title 28, Section 1491, Paragraph 1:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

June 25, 1948, ch. 646, 62 Stat. 940.
28 USCA 1491 (1973 pocket part)
by amendment of 29 August 1972, 86 Stat. 652:
To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."
This act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

28 United States Cole, Vol. 7, page 6037, 1964 ed., Section 2411 (b):

Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment. (June 25, 1948, ch. 646, 62 Stat. 973; May 24, 1949, ch. 139, Section 120, 63 Stat. 106.)

1964 edition, volume 7, page 6040,
28 United States Code, 2501:

Every claim of which the Court of Claims has Jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. June 25, 1948, ch. 646, 62 Stat. 976.

28 United States Code, 2516, (1964) page 6043, Volume 7:
(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof. (June 25, 1948, ch. 646, 62 Stat. 978.)

Title 50 App. US Code, Supplement V, 1941 — 1946, page 1154, 55 Stat. pages 799, 800:
Section 731: . . . during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war. (Dec. 13, 1941, ch. 571, sec. 1, 55 Stat. 799.)
Section 732: The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section (section 731 of this Appendix): Provided, that

nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment or commission at an earlier date in any case. (Dec. 13, 1941, Ch. 571, Sec 2, 55 Stat. 800.)

A Joint resolution of Congress enacted 3 July 1952, at 66 Stat. 330:

Whereas the last of the states of war of World War II and the national emergencies proclaimed by the President in 1939 and 1941 were terminated on April 28, 1952, . . .

Rules of the United States Court of Claims, loose-leaf, revised September 1, 1969:

Page 14, Rule 37. DEFENSES

(a) Form of Denials: A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. . . . .

(b) Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . .

Page 15,

(c) Effect of Failure To Deny: Averments in a pleading to which a responsibe pleading is required, other than those as to the amount of damages, shall be deemed admitted when not denied in the responsive pleading.

Rule 38. DEFENSES AND OBJECTIONS;

(a) Time for Answer and Reply: . . . .

(b) Defenses; How Presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or a third-party claim, shall be

asserted in the responsive pleading thereto if one is required, except that the following

page 16

defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(c) Motion for Judgment on the Pleadings: After the pleadings are closed, any party may move for judgment on the pleadings: Provided, That no such motion may be filed, except by leave of court, after the case has been set for trial. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(d) Preliminary Hearings: The defenses specifically enumerated (1) and (2) in paragraph (b) of this Rule 38, whether made in a pleading or by motion, and the motion for judgment mentioned in paragraph (c) of this rule shall, on motions of any party, be heard and determined before trial, unless the court orders that the

hearing and determination thereof be deferred until the trial.

Rule 38, continued on page 17:

(e) Motion for More Definite Statement: . . . .

(f) Motion to Strike: Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter, or any insufficient defense.

(g) Consolidation of Defenses: A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except as provided in paragraph (h) of this rule.

(h) Waiver of Defenses: A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim, may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings; and (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

HEADQUARTERS, DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U.S. ARMY ADMINISTRATION CENTER
ST. LOUIS, MISSOURI 63132
(Seal, Dept. of Defense)

IN REPLY REFER TO:
AGAC-SD-T Rynerson, Wendell P.
0 264 252 (11 Mar 65)

20 MAY 1965

Mr. Wendell P. Rynerson
118 12th Street, S. E.
Washington, D. C. 20003
Dear Mr. Rynerson:

I again refer to your application for retired pay benefits.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of Reserve Components who have completed 20 years of qualifying service on attainment of age 60.

Your records show you have completed 17 years, 10 months and 23 days qualifying service. A reply has been received from the National Guard Bureau, which fails to substantiate your claim of qualifying service subsequent to the date of your discharge, 14 October 1945. If you have any evidence in your possession, such as a copy of appointment or orders terminating your appointment and will forward it to this office, further consideration will be given your case.

Since you have not completed the minimum of 20 qualifying years of service, you are not eligible to receive retired pay benefits under the above law.

Sincerely yours,
D.D. Spahr
D. D. SPAHR AD
Colonel, AGC
Commanding

IN THE UNITED STATES COURT OF CLAIMS
No. 57-71

WENDELL P. RYNERSON

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on defendant's motion filed May 10, 1971, to dismiss the petition and on plaintiff's motion, filed June 9, 1971, for summary judgment, having been submitted to the court on the briefs of the parties and oral argument of counsel for defendant and plaintiff, pro se.

The only claim on which plaintiff sues is for retired pay and that claim, which did not accrue until less than six years prior to the filing of the petition, is not barred by the statute of limitations. See Sauer v. United States, 173 Ct.Cl. 642,354 F.2d 302 (1965); Oceanic Steamship Co. v. United States, 165 Ct.Cl. 217, 218-219 (1964); Nager Electric Co., Inc. v. United States, 177 Ct.Cl. 234, 240, 368 F.2nd 847 (1966).

Plaintiff's contention that his discharge in 1945 merely released him from active duty is rejected; it is clear that the discharge separated him entirely from his reserve commission.

Plaintiff's contention that, in any event, the 1945 discharge was invalid raises triable issues of fact and law which cannot appropriately be decided on the arguments and documents presented on the motion for summary judgment.

IT IS THEREFORE ORDERED that defendant's said motion to dismiss the petition (which motion is based on the ground that the claim is barred by limitations) be and the same is denied.

IT IS FURTHER ORDERED that plaintiff's said motion for summary judgment is denied and the case is

returned to the trial commissioner for trial on further appropriate proceedings.

BY THE COURT
NOV. 11, 1973 Chief Judge

In the United States Court of Claims

No. 57-71

(Filed Dec. 14, 1972)

WENDELL P. RYNERSON v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT *

Wendell P. Rynerson, attorney of record, for plaintiff. Karen A. Berndt, with whom was Assistant Attorney General Harlington Wood, Jr., for defendant.

OPINION

BERNHARDT, Commissioner: In October 1945, after almost 18 years of military service in the Army

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* The opinion, findings of fact, and recommended conclusion of law are submitted under Rule 134(h).

Reserves, including combat exposure in 5 years of active duty spanning World War II, the plaintiff was honorably discharged in the rank of captain as the result of a reclassification proceeding authorized by AR 650-230. Reclassification is a military euphemism for judicious pruning of unwanted "dead wood." After several futile efforts administratively for restoration, reappointment, or recognition so that he could muster 20 years of covered service to meet the longevity retirement minimum, including two unsuccessful applications to the Army Board for Correction of Military Records in 1957-60, the plaintiff sued here on February 25, 1971, claiming retirement pay from May 1, 1965, he having reached the retirement age of 60 years on April 28, 1965. All of the administrative steps taken by plaintiff were permissive rather than mandatory remedies.

In response to the defendant's motion to dismiss on the grounds that a cause of action accruing in 1945 would be outlawed 6 years later by the statute of limitations (28 U.S.C. X2501), the appellate division of the court on November 11, 1971, denied the motion by order holding that the claim for retired pay accrued in May 1965, less than 6 years prior to the bringing of the petition, and was thus not time-barred. The order in passing rejected plaintiff's contention that his 1945 discharge merely released him from active duty but did not terminate his reserve commission, and returned the case to the trial commissioner to try the issues of fact and law pertaining to the questioned validity of the 1945 discharge.

Defendant filed its answer on February 25, 1972, and an amended answer on March 17, 1972, alleging laches in the latter as an affirmative defense. For certain the court's order of November 11, 1971, did not intend to — nor could it — restrict the issues for either party, except to the extent of rejecting the statutory time-bar defense and the plaintiff's contention that his 1945 discharge separated him only from active duty but not from his reserve commission. Nor could the failure of the

defendant to link its defense of laches to the sister defense of the statute of limitations in the unsuccessful motion to dismiss operate as a waiver of the laches defense.

At a brief trial the testimony of plaintiff and that of his superior officer who had instigated the reclassification in 1945 added nothing of substance to the already available documentary record controlling the issues. As presented by plaintiff these issues relate generally to various procedural irregularities in the reclassification proceeding, and to the arbitrary, capricious and unjust denial in 1957 and 1960 by the Army Board for Correction of Military Records of plaintiff's applications for the correction of his discharge record. Denying these allegations, the defendant pleads affirmatively the defense of laches because the plaintiff's petition was filed on February 25, 1971, some 64 days short of 6 years following the accrual on May 1, 1965, of the cause of action for longevity retirement pay for which plaintiff sues. The laches defense is dispositive and sustained.

No essential difference in principle is observed from the situation in Cason v. United States, 198 Ct. Cl. 650, 461 F. 2d 784, where on June 16, 1972, the court granted defendant's cross-motion for summary judgment and dismissed the petition on a defense of laches [1] There the plaintiff, a former enlisted man in the Navy, waited until the last day of the 6-year statutory period following his involuntary discharge to file his petition for back pay challenging the discharge on procedural grounds. While voicing the orthodox view that the elements of delay and prejudice to the defendant must both be present for application of the laches doctrine, the court adumbrated that where the delay is almost equal to the period for application of the statute of limitations the plaintiff must explain his delay and show that the defendant has

1. Cason is awaiting action by the court on plaintiff's motion for reconsideration argued November 3, 1972.

not been prejudiced.

The delay in the Cason precedent was, if anything, more defensible than in the case under consideration. Between the accrual of Cason's cause of action and the filing of his suit almost 6 years later he applied for review before the Navy Discharge Review Board, to which the claim was subsequently returned by the Secretary of the Navy for reconsideration. In contrast, after learning on May 20, 1965, that he was not eligible to receive retired pay benefits for which he had applied on March 11, 1965, Mr. Rynerson did nothing whatsoever to pursue his claim until he filed his petition here on February 25, 1971.

Cason referred to other military and civilian pay cases in which a lack of diligence and resulting prejudice to the defendant were found where the delay was as little as 11 months. Prejudice to the defendant was found in that had Cason been more prompt in claiming error "the Navy might have been able to clear its records in a new proper proceeding", and that "witnesses may have died, certainly have forgotten some facts of the case, have likely retired from the Service or otherwise become unavailable and documents may have been destroyed." Further, as to the adverse effect of delay on Navy officials: "Their impartiality, competence, or devotion to law are impugned more or less, and they are subjected to some harassment that interrupts their performance of public duty."

A vigorous dissent in Cason failed to see any prejudice to the defendant in the delay, for (as in Rynerson's case) there was no problem of paying two individuals for performing one job, nor any possibility of restoration to the service, nor any question of fading memories since the documentary record controlled the issue of procedural deficiencies without need for testimony. No aspect of the delay by plaintiff, said the dissent, would prejudice the Navy by preventing it from clearing its own records through a new proceeding. Finally, the

dissent expressed the view that Cason had been invalidly discharged and was entitled to recover.

The majority opinion in Cason appears to add teeth to the laches defense in military pay cases, not only by enlarging the definition of prejudice to the defendant, but also by casting on the plaintiff the burden of proving a lack of prejudice to the Government, whereas laches is commonly viewed as an affirmative defense in proof of which the defendant has the laboring oar. In each case the evidence as to prejudice to the Government, or the lack of it, was latent in the documentary record rather than being the subject of demonstration by the parties through anything more than the force of their arguments. However, the fit of the Cason precedent to the Rynerson case is too tight to distinguish, and thus controls.

Despite the disposition of the claim on the basis of laches, the report of facts following this opinion covers all aspects of the issues relating to procedural irregularities in the reclassification and correction board proceedings. Their status is not prejudiced by the passage of time, for they rest on documentary records, and fading memories of witnesses, etc., are no impediment. The reported facts demonstrate rather persuasively the following propositions:

1. The reclassification regulation, AR 650-230, is poorly drawn, confusing, and internally inconsistent.

2. Contrary to plaintiff's contentions, the initiating officer and interviewing officer were duly authorized and empowered to serve in those roles in the plaintiff's reclassification proceeding.

3. The reclassification proceeding deprived plaintiff of basic due process rights with respect to giving him adequate opportunity to learn of the charges against him and to procure statements in his own behalf.

4. The report of interview was perfunctory rather than comprehensive as the regulation required, and the interviewing officer was apparently not aware that he

had an adjudicatory rather than a merely ministerial function.

5. The initiation and interview steps of the procedure were combined to plaintiff's disadvantage.

6. The action of the correction board was not based on substantial evidence in that it failed to account for the fact that, after eliminating review consideration those affidavits of individuals whose recantations were before the correction board, the information remaining adverse to plaintiff was too trivial to justify the harsh action of involuntary discharge of an officer having almost 18 years of credited service.

The defense of laches must be sustained and the petition dismissed.

201 Ct. Cl. 527

In The United States Court of Claims
No. 760-71
(Decided May 11, 1973)

LINDBERGH KIRBY v. THE UNITED STATES

David E. Trice, attorney of record, for plaintiff.

Steven J. Bercik, with whom was **Assistant Attorney General Harlington Wood, Jr.**, for defendant.

Before **Cowen**, Chief Judge, **Davis, Skelton, Nichols, Kashiwa, Kunzig**, and **Bennett, Judges.**

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Bennett, Judge, delivered the opinion of the court:

The plaintiff is a former Air Force master sergeant who on October 12, 1971, brought this suit pursuant to 28 U.S.C. X1491 in an attempt to recover active duty back pay and allowances and retired pay and allowances denied him as a result of an alleged illegal discharge he received from the Air Force on May 2, 1963. The court

concludes with respect to the active duty pay claim that the plaintiff's petition must be dismissed as outside our jurisdiction for having failed to hurdle the threshold issue of the 6-year statute of limitations (28 U.S.C. X2501). With respect to the retired pay claim the petition must likewise be dismissed for failure to state a cause of action upon which relief can be granted. The pertinent facts follow:

The plaintiff first enlisted in the Army in June 1946. He transferred to the Air Force soon thereafter when that branch evolved from the Army Air Corps. Plaintiff served nearly continuous enlistments from June 1946 to May 2, 1963, at which time he received an honorable discharge from the Air Force.[1] Prior to his discharge, the plaintiff had served 16 years, 6 months and 23 days of creditable active duty. At the time of his discharge the plaintiff was in the process of serving a 6-year enlistment that had begun on July 10, 1961. Had he served through the full term of this last enlistment, he would have been eligible for retirement, having credit for more than 20 years of active service.

The discharge plaintiff received in May of 1963 grew out of an incident that occurred on November 21, 1962. On that date the plaintiff was arrested by the civilian authorities in Homestead, Florida, for having committed an undenied act of indecent exposure on the streets of that city. The civilian authorities released the plaintiff to the local Air Force authorities. He was admitted as a patient on November 23, 1962, at the Homestead Air Force Base hospital. On November 27, 1962, he was transferred to the hospital at Eglin Air Force Base for in-patient treatment and psychiatric evaluation. The results of the medical evaluations led to plaintiff's eventual discharge on the grounds of unsuitability, but only after a number of recommendations and opinions were received at discharge board

[1] Plaintiff served through four continuous reenlistments except for a break from June 30, 1950 to October 9, 1950.

proceedings. It is the conduct of these proceedings which the plaintiff alleges violated Air Force regulations and which, therefore, rendered his discharge invalid. The arguments presented by the plaintiff in this regard are challenging, but the court cannot now accept them as dispositive because plaintiff has slept on his rights to challenge the alleged irregularities within the time allowed by the statute of limitations for a judicial test.

Any examination of the applicability of the statute of limitations to a given set of facts should begin with the language of the statute itself. This statute 28 U.S.C. X2501, bars the Court of Claims from taking jurisdiction over a claim "unless the petition thereon is filed within six years after such claim first accrues." In his supplemental brief, the counsel for the plaintiff conceded that the claim for the active duty back pay which the plaintiff should have received if the alleged illegal discharge had not occurred in May of 1963, was clearly barred by the statute of limitations as interpreted by the court in **Mathis v. United States**, 183 Ct. Cl. 145, 391 F. 2d 938 (1968), **aff'd on rehearing**, 190 Ct. Cl. 925, 421 F. 2d 703 (1970). In that case, dealing with a claim for active duty pay, the court held that "the cause of action accrued all at once upon the plaintiff's removal." 183 Ct. Cl. at 147, 391 F. 2d at 939. Thus, the petition filed by the plaintiff in October of 1971 came 8½ years after the plaintiff's discharge in May of 1963.

Following the discharge, plaintiff Kirby eventually applied to the Air Force Discharge Review Board, seeking to have it remove the bar to his future enlistment and to have the board change the nature of his discharge. After a hearing the Discharge Review Board, on September 28, 1967, denied the plaintiff's application. This was followed by an appeal to the Air Force Board for Correction of Military Records, which appeal was denied on January 17, 1968. It is clear that these post-discharge remedies which the plaintiff pursued were permissive in nature and do not serve to toll the running

of the statute of limitations. **Mathis v. United States**, supra, 183 Ct. Cl. at 147, 391 F. 2d at 939; **Kirk v. United States**, 164 Ct. Cl. 738, 742-43 (1964); **Lipp v. United States**, 157 Ct. Cl. 197, 199, 301 F. 2d 674, 675 (1962), cert. denied, 373 U.S. 932 (1963). Plaintiff does not contend otherwise. Therefore, as the plaintiff has conceded with respect to the claim for active duty pay, the petition was filed too late to be considered by the court. The second and more important issue left for the court's consideration is whether the plaintiff's claim for the retirement pay also falls if the claim for active duty pay is barred by 28 U.S.C. X2501. The question may be stated in this way: May plaintiff bring an action for retirement pay more than 6 years subsequent to the date of his final discharge when his entitlement to retirement depends upon invalidating the discharge?

In an affirmative answer to the foregoing question, plaintiff attempts to draw a distinction between the active duty claim and the retirement claim by arguing that if the discharge is found to be illegal as a matter of law, then he should receive constructive credit for the years still to be served under his last 6-year enlistment contract up to July 9, 1967, at which point he could have retired with more than 20 years of active service to his credit. Thus, since July 9, 1967, was the first time he would have been eligible for retirement it is claimed to be also the first time he could have sued for retirement pay and, therefore, is the date upon which his cause of action for retired pay first accrued for statute of limitations purposes. If all of the plaintiff's premises are accepted, it is clear that the petition filed in October of 1971 was timely with respect to the claim for retirement pay. But, note that plaintiff's pyramid of presumptions is based upon voiding the 1963 discharge over 8 years after receiving it.

In an effort to measure the merits of the plaintiff's thesis, attention should first be turned to the general rule found in **Oceanic S.S. Co. v. United States**, 165 Ct.

Cl. 217, 225 (1964), for determining precisely when a cause of action accrues for statute of limitation purposes. There the court held:

> A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.....(cites omitted).

At 218 the court said, "....for this court no cause of action accrues before the claimant can bring a suit for money judgment." See also, Nager Elec. Co. v. United States, 177 Ct. Cl. 234, 252, 368 F. 2d 847, 859 (1966). These were contract cases. The same standard applies where the Government's obligation arises as the result of a statute (as in the present case). Sauer v. United States, 173 Ct. Cl. 642, 647, 354 F. 2d 302, 304 (1965).

While it seems clear that plaintiff Kirby could not have sued to receive his retirement benefits in any suit filed prior to the end of enlistment in July 1967 because he did not have 20 years of service, it likewise is clear that if he had successfully brought suit to recover his lost active duty pay within 6 years of his discharge he would automatically have received constructive credit for the time subsequent to his discharge, which would have rounded out the 20 years required for retirement by 10 U.S.C. 8914, and no suit for retirement would have been necessary. Diamond v. United States, 192 Ct. Cl. 502, 427 F.2d 1246 (1970). Gearinger v. United States, 188 Ct. Cl. 512, 412 F. 2d 862 (1969). All events required to fix defendant's liability for the retired pay would thus have taken place within the limitations period. As the matter stands, however, the "all events" requirement to fix defendant's liability has never transpired so plaintiff's cause of action for a money judgment for retirement is nonexistent, having never accrued. It is true that entitlement to active duty back pay and retirement pay arise under different sections of the

Code and accrue as the result of different events. Nonetheless, as noted above, there is a clear nexus between the two. Where the right to the first is demonstrated, the other may follow as a matter of course. It is the precise nature of this connection which requires further analysis.

In pertinent part, 10 U.S.C. 8914 provides: "....a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired." In the past this court has denied a reserve officer the right to retirement benefits under a similar provision (10 U.S.C. 1331) for failing to complete the qualifying 20 years of service. **Montilla v. United States**, 198 Ct. Cl. 48, 457 F. 2d 978 (1972). The same unequivocal rule applies to an Air Force enlisted man under 10 U.S.C 8914. The plaintiff has not served the required length of time to become eligible for the retirement benefits he now seeks. He attempts to avoid this obstacle by asking this court to re-examine and invalidate the May 1963 discharge proceedings in the context of this retirement claim, thereby giving him constructive credit for the years of active duty he did not serve between May 1963 and July 1967. Such a re-examination is clearly barred by the statute of limitations with respect to the active duty claim. As a result, the court does not feel that it has the power to hold otherwise in the context of the retirement claim. The stumbling block comes from the fact that once this plaintiff was officially discharged from the Air Force, he lost the right to earn future active duty pay and, since he had not, at that moment, completed 20 years of service, the future right to receive retirement pay and allowances lapsed as well. The plaintiff had 6 years in which to challenge in court the legality of his discharge in order to protect his right to fulfill his enlistment commitment and obtain the needed years of service for retirement. This he did not do and cannot be allowed to do at this time through the

vehicle of the retirement claim. The one rests on the other like a house on a foundation; without the foundation, the house will not stand.

In reaching this result, the court is not stating a new rule. **Hames v. United States**, 164 Ct. Cl. 746, **cert. denied**, 377 U.S. 904 (1964); **Palmer v. United States**, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). In **Palmer**, for instance, the court reached a similar conclusion where the plaintiff was seeking to obtain the difference between the retirement pay he would have received had he not allegedly been wrongfully demoted in 1944 from a hazardous duty position more than 6 years prior to filing the suit in 1953. Palmer alleged, as does Kirby, that procedural irregularities made his demotion (which he considered a wrongful discharge) invalid. The demotion to a nonhazardous duty position prevented the plaintiff from serving 20 years in the hazardous duty job, which was a prerequisite to receiving the higher hazardous duty retirement benefits. No back pay was claimed. Palmer retired in 1950. The court dismissed the petition on alternate grounds. First, the petition was filed too late: "Any claim based on that alleged removal (the demotion) is now barred by the six-year statute of limitations, 28 U.S.C .2501 (1952 ed.)....." 129 Ct. Cl. at 326, 121 F. Supp. at 645. The second basis for dismissing the petition rested on the plaintiff's failure to state a cause of action because the pertinent statute in that case required the plaintiff to spend 20 years of actual service in a hazardous duty position. The **Palmer** court treated the two bases for its decision as being completely independent of one another and there they plainly are, nothing in the opinion implying otherwise. However, we need not treat the facts of this case in precisely the same manner. As discussed before, the issue of when the statute of limitations begins to run, and when a plaintiff has stated a sufficient cause of action, may be interrelated, as here. In addition, this plaintiff does not need to show 20 years of actual service in order to qualify for the retirement benefits he now seeks. In

Gearinger v. United States, supra, the court held, in a case where the statute of limitations was not an issue, that a serviceman can receive constructive active duty credit as part of a claim for active duty pay, which fulfills the requirements of the retirement statute. Plaintiff Kirby, however, has neither served the necessary 20 years, nor has he received constructive credit therefor. In effect, the plaintiff's right to sue for retirement benefits has never accrued and will not accrue until he actually serves the requisite number of years or receives constructive credit for the same by voiding the discharge in an action for his active duty pay. These opportunities are closed to him by the **Mathis** case as discussed **supra**; thus, the plaintiff has not alleged a cause of action for which relief can by granted.

The language in the opinion in **Sauer v. United States, supra**, does not aid the plaintiff in this case. In **Sauer** the plaintiff, prior to 1944, had been employed by the Federal Bureau of Investigation where he had accumulated 89¼ days of unused annual leave. In 1944, the plaintiff transferred and sought to carry with him credit for the annual leave he had accumulated at the FBI. This request was finally denied him in 1953. The plaintiff did not sue to receive a lump sum amount for this uncredited unused leave until 1964, 3 years after he had retired from Government service. The defendant's primary defense was that the plaintiff's cause of action had accrued in 1944, or at the latest in 1953; therefore, the petition was too late when filed in 1964. In rejecting this position, the court noted that the statute which authorized a lump sum recovery for unused accumulated leave required the employee's separation from service as a prerequisite to making a claim for the money. Thus, it is clear that application of the **Oceanic S.S. Co.** test results in the starting of the statute of limitations on the separation of the employee from Government service since this is the last event required by statute before the claimant would be entitled to bring his suit. In the case at hand, as heretofore noted, the last

event necessary before this plaintiff can sue for his retirement claim has not yet occurred and probably never will — the receipt of credit for 20 years of service.

Nothing that has been said thus far should be read to imply that the court is closing the door to the examination of events that have taken place more than 6 years prior to the filing of the suit. Where the plaintiff can allege a sufficient cause of action at the time the suit is filed, and where the last event necessary to sue has occurred less than 6 years before, the court is perfectly free to examine the operative facts determinative of the issues involved, even if they have taken place more than 6 years before. Neither is the court using the statute of limitations to foreclose the examination of an issue that is part of a larger, single cause of action. With respect to the retirement claim, however, the plaintiff must allege that he has received credit (actual or constructive) for 20 years of service before he has stated a sufficient cause of action. Challenging the validity of the discharge as a means of obtaining constructive service time could only be done as a part of the active duty claim. Once the plaintiff has let that opportunity lapse, he has likewise lost the opportunity to challenge the discharge in the retirement context. Stated another way, when a plaintiff seeks retired pay based on 20 years of service he must be able to show either that he has that service by actually having served it or by having received constructive credit therefor by invalidating a discharge which prevented the required actual service. Plaintiff has done neither, so he states no cause of action for which relief can be granted within our jurisdiction, as heretofore noted. The back pay claim and the retirement claim are not severable under the facts of this case. The first underpins the second. The claim for back active duty pay is admittedly dead, killed by age and the affliction of the statute of limitations. The retirement claim here can exist only if the back pay claim exists so they must be interred together. It would be very strange, indeed, to allow

recovery for the retirement claim and deny it for active duty when both claims depend upon voiding the same discharge.

Once the discharge became effective, the theoretical end of plaintiff's enlistment, which was thereby cut short, is meaningless for purposes of the statute of limitations or for determining when the retirement cause of action accrues. There is nothing harsh in this rule. At the moment a serviceman is discharged under conditions like these, he knows that he has not fulfilled the requirements necessary for retirement. It is incumbent upon him at that point to protect his right to serve further by timely attacking the discharge. He could do this by a suit for active duty back pay, reinstatement, mandamus, or declaratory judgment in an appropriate court. A timely challenge in this manner to the discharge would not accrue a cause of action for a 20-year retirement immediately but would make it foreseeable by protecting the opportunity to earn it, which was not done here.

Prior to enactment of Pub. L. No. 92—415, on August 29, 1972, 86 Stat. 652, plaintiff could have sought declaratory judgment or restoration to his position only in the United States District Court and recovered back pay there for less than $10,000. Said Act, however, gave reinstatement jurisdiction to the Court of Claims "as an incident of and collateral to" a money judgment within its general jurisdiction to enter money judgments under the Tucker Act. This court does not have declaratory judgment jurisdiction except in renegotiation cases pursuant to Pub. L. No. 92—41, 3, 85 Stat. 97, 98 (1971). **Lykes Bros. S.S. Co. v. United States**, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972). The Court of Claims does not otherwise have general equity powers or declaratory judgment authority. **United States v. King**, 395 U.S. 1 (1969). These Acts did not affect the statute of limitations pertinent here. For instance, we cannot restore a discharged Government employee to his job if his claim for back pay is barred by the statute of limitations. Nor can we

enter a declaratory judgment that plaintiff Kirby was wrongfully discharged when the time has elapsed within which we could give him a money judgment for back pay. To do so would be, in effect, reinstating plaintiff to his position for several years for retirement pay purposes, which, for reasons noted above, is beyond our authority. As stated in United States v. King, supra, before this court has jurisdiction it must be for "actual, presently due money damages from the United States." 395 U. S. at 3 Plaintiff's claim for retirement pay does not meet this test, for he has not proved that he has 20 satisfactory years of active service. In fact, he admits that he does not, so he has not alleged a cause of action for retired pay on which relief can be granted. This court cannot supply the years of service, nor waive the requirement, nor award the retired pay without such service, unless the plaintiff has a valid court judgment giving him credit for such service.

In Sauer the plaintiff could have filed an action in mandamus or a declaratory judgment suit at the time it became clear that he was not going to receive credit for the leave he had accumulated at the FBI. The successful conclusion of such a suit in that case would not, however, have accelerated the time for the accrual of his cause of action since it was dependent on separation from the service. More important, the receipt of credit for the accumulated leave was nothing more than a paperwork transaction. There was no doubt at anytime that plaintiff Sauer had actually accrued the unusued annual leave which was the basis for the lump sum claim. The accumulated leave in that case corresponds to the 20 years of service in this case. The court could not have given the plaintiff in Sauer credit for the accumulated leave if he had not actually accumulated it while an employee of the FBI. The situation is the same in the case now before the court. By requiring the plaintiff to challenge his discharge within 6 years of the date it becomes effective, the court is asking the plaintiff to show actual or constructive credit for 20 years of service before he brings the suit and not to seek

to raise himself by his own bootstraps by asking first for constructive credit for the lost years of service and then for retirement pay based on that credit, all in the same lawsuit. As the facts now stand, the plaintiff has not served the 20 years required by the statute for retirement. Until he has served or received constructive credit for such service he has no right to the retirement benefits he now seeks. The oral argument was made that this places a burden on a discharged serviceman who doesn't care to be restored to his position in the service because he is lucky enough to go out and find an equal or higher paying job as in **Palmer**. In such a case he must nevertheless contest the discharge when, in fact, he stands to gain no monetary recovery since he has no damages for lost pay. Under these circumstances, it is said, he should be allowed to sue for retirement pay at the time he would have retired. The short answer to this idea supporting the proposition that a man should be permitted to sue at his convenience, for retirement on the basis of time not served, is that if the serviceman is discharged without having served 20 years, and he is unwilling to protect his right to continue to serve within the reasonable length of time provided by law, then he has no basis for seeking benefits that are supposed to accrue only to those who serve honorably for 20 years. Any other rule than here announced will lead to the filing of stale claims 25 years old, or older, and emasculate the statute of limitations. This is contrary both to law and public policy. **Friedman v. United States**, 159 Ct. Cl. 1, 11, 310 F. 2d 381, 387—88 (1962). Our statute of limitations is jurisdictional and must be strictly construed to avoid prosecution of stale claims which defendant can be prejudiced in contesting because excessive lapse of time dulls memories, accounts for missing witnesses, and occasions periodic, routine destruction of Government records. **Crown Coat Front Co. v. United States**, 386 U.S. 503, 517 (1967; **Feldman v. United States**, 149 Ct. Cl. 22, 32, 181 F. Supp. 393, 400 (1960); **Dawnic S.S. Corp. v. United States**, 90 Ct. Cl. 537, 579 (1940).

In conclusion, the court finds that plaintiff Kirby has, with respect to the active duty pay claim, filed his suit beyond the period allowed by the statute of limitations. With respect to the claim for retirement pay, the plaintiff has not shown the necessary length of service requisite to bringing such a claim and he cannot obtain constructive credit for the missing years of service by challenging an alleged illegal discharge in the context of this claim for retirement benefits, for he waited too long. The plaintiff's motion for summary judgment is denied and the defendant's cross-motion is granted. The petition is dismissed.

Davis, Judge, dissenting in part:

This limitations problem has occasioned much deliberation, and the result is Judge Bennett's admirable opinion for the court, carefully keying the present decision to our prior reported rulings,[1] and explaining its rationale.

I think that the opinion is consistent with the court's earlier holdings in the limitations field (except as indicated in note 1, supra). My understanding of the underpinning of Palmer v. United States, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954), and Hames v. United States, 164 Ct. Cl. 746, cert. denied, 377 U.S. 904 (1964), is that a plaintiff suing for retirement pay (military or civilian) cannot go into the lawfulness of an adverse administrative action (removal or demotion) which accrued more than 6 years before commencement of suit if there is some statute indicating that Congress wanted the retired individual to have actually served the number of years required for retirement, or showing that Congress desired a particular administrative body to decide, on a discretionary basis, whether the plaintiff

[1] I regret that the court does not acknowledge that it is overruling the unpublished order in Rynerson v. United States, No. 57-71, dated November 11, 1971. Though it did not happen to be reported, the Rynerson order, which was unanimous, came after oral argument and consideration by the then full court.

had earned or merited the particular type of retirement. In **Palmer** the court interpreted the "hazardous duty" retirement statute as requiring at least 20 years actual investigative work, and the opinion also indicated (129 Ct. Cl. at 326, 121 F. Supp. at 645) that under that statute the head of the department and the Civil Service Commission had substantial discretion to determine whether the employee deserved that kind of retirement. In **Hames**, there was a statute flatly disallowing credit "for any period of separation from the service in excess of three calendar days", which we interpreted as requiring the Civil Service Commission to leave out of account all periods of removal unless the employee had brought a timely action to set aside the removal as alleged. Rather than being based solely on limitations, both **Palmer** and **Hames** rested on a combination of limitations together with failure to state a claim for relief—i.e., the substantive statute which the Government invoked as a defense prevented the claimant from having a proper claim for retirement pay unless he had timely brought suit to overturn the prior adverse administrative action. Under that rule, the question in each case is whether there is any substantive legislation or regulation (apart from the statue of limitations) which suggests that Congress would want the claimant not to wait until his retirement to test some prior adverse action.

As I see it, **Sauer v. United States**, 173 Ct. Cl. 642, 354 F. 2d 302 (1965), and **Oceanic S. S. v. United States**, 165 Ct. Cl. 217 (1964), are consistent with this **Palmer-Hames** rationale. In **Sauer**, the F.B.I. retirement pay had all been earned before the plaintiff transferred, and the court did not think that there was any statute or regulation (as there was in **Palmer** and **Hames**) implying that **Sauer** had to bring a suit within six years (or earlier) of his transfer to this court (or of the refusal of our Clerk to credit that prior leave) to test the refusal to credit the leave. In **Oceanic** the situation was the same; there was no statute or regulation suggesting or calling

for an earlier inquiry into the disputed substantive issue; on the contrary, the court thought that the applicable regulations were clear that the claimant did not have to sue until after a "final accounting" had been made by the defendant.

Although the court's decision in this case harmonizes with **Palmer-Hames-Sauer-Oceanic**, I depart from it, with some hesitation, because, unlike the majority, I do not see the military retirement statutes in the same light as the "hazardous duty" retirement legislation in **Palmer** or the statutory requirement in **Hames** that creditable service be actually served. I would avoid holding that in the military retirement system Congress has laid down the Procrustean requirement that the 20 years (or more) be actually served in all cases, except where suit is brought within 6 years of the adverse action. Congress did not say explicitly that the service had to be "actual" in all instances, and we have some leeway in inferring an intention to recognize "constructive" service where appropriate.

The hypothetical case which mainly troubles me is that of a serviceman who has been told by an official that he has enough years or points or credits for retirement, and, on the basis of that assurance, does not sue to set aside an early adverse action because he thinks that, apart from that adverse action, he still has enough eligibility for retirement; on retirement he suddenly discovers that the earlier representation was mistaken and that, in order to be eligible at all, he does have to overturn the prior adverse action. Under our recent decisions in **Montilla v. United States**, 198 Ct. Cl. ——, 457 F. 2d 978 (April 1972) and **Parker v. United States**, 198 Ct. Cl. ——, 461 F. 2d 806 (June 1972), the claimant could probably not say that the Government was estopped. If we apply the majority's rule, it is hard to see how an exception could be made for this potential case; limitations is not a doctrine like laches which can

be tailored to fit particular circumstances.[2]

To avoid such possible injustices, it seems to me preferable to hold that the claim for retirement pay does not accrue until retirement, and to rely on the equitable principles of laches — which apply to military pay cases, Cason v. United States, 200 Ct. Cl. ——, 471, F. 2d 1225 (Jan. 1973) — to fend off stale claims and stale issues. A plaintiff who needlessly waited 20 years or so would find himself locked out by laches.

In this particular case, the time-lag was short, and there appears to have been no prejudice to the Government by the delay, and accordingly I would hold laches not to be a bar. On the merits, I would hold for plaintiff but withhold giving my reasons since the court does not reach that issue.[3]

NICHOLS, Judge, dissenting:

I had written an opinion for the court, coming to a conclusion opposite to that of Judge Bennett, as to retirement pay but apparently mine was convincing only in a negative sense. It would be standard procedure to use it as a dissent, or the starting point for one, but I refrain from doing so here. Much of it discusses the reasons why Lindbergh Kirby's discharge was illegal. The court says plaintiff's arguments are "challenging" which is perhaps an understatement, but I am not sure it is proper to publish comments which might have precedential value about the merits of a case the court holds it lacks jurisdiction to decide.

As to the statute of limitations, the court is plainly wrong in asserting it is not stating a new rule, citing Hames v. United States, 164 Ct. Cl. 746, cert. denied, 377

[2] 10 U.S.C. 1331 (d) and 1406 do not apply before October 1966, and, even after that date, do not apply to adverse actions reducing the number of years of creditable service upon which retired pay is computed.

[3] My dissent relates solely to the claim for retirement pay. I agree with the court as to active-duty pay.

U.S. 904 (1964) and Palmer v. United States, 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). Hames is cited just because it cites Palmer. Palmer is the important decision. The court correctly states the facts therein, and correctly summarizes the holdings. It is clear the ground, as to hazardous duty, is a valid reason for the decision. You cannot constructively earn a hazardous duty annuity, but can only do so by performing twenty years of hazardous duty. As the court concedes, however, that rule is not relevant here, because it is possible to earn constructively an annuity of the type plaintiff here lays claim to Palmer's other ground, the statute of limitations, is plainly wrong. The original papers, retrieved for me from the Records Depository, show that Palmer had no money claim rising out of his unlawful demotion. After a brief period, he transferred to another Government agency at his old pre-demotion salary. He applied to the GAO, which paid him all he had lost while the demotion was in effect. He was not out of pocket one cent at that point. The published opinion in Palmer does not indicate the court was unaware of this. In saying that the demotion started our statute (28 U.S.C. — 2501) running, it must have had in mind that Palmer could have sued for a declaratory judgment, or mandamus. In Sauer v. United States, 173 Ct. Cl. 642, 354 F. 2d 302 (1965), obviously a more carefully considered decision, we held that the possibility of seeking remedies outside the Court of Claims, such as declaratory judgment or mandamus, does not start — 2501, the Court of Claims statute, running. Only the availability of a money claim does that. I consider that Sauer overrules the Palmer holding on the statute of limitations, and Palmer should not be cited here unless the court is prepared to reinstate it and overrule Sauer. You can't treat a decision holding one thing and a decision holding the opposite, as both valid and binding authorities. Not only is Palmer bad law, but so is Hames in citing Palmer to dispose summarily of a claim that could have been thrown out for several other reasons.

I would have held that an unlawfully discharged soldier could waive his claim for active duty pay and sue for his annuity when, as here, he would have earned it within his current enlistment, and the right to the annuity accrued less than six years before the suit was brought. If the majority will candidly concede they are fashioning new law, I will likewise concede I would have been if my view had prevailed. The fact is, the problem is one that, except once, we had not faced up to before. I thought that the careful analysis of the consequences of — 2501 in Oceanic S.S. Co. v United States, 165 Ct. Cl. 217, 225 (1964) and in Sauer, supra, pointed the way to my conclusion.

I also believed we had put our foot squarely on that path by reason of an order approved by a unanimous court, holding as stated above, in course of remanding a case for trial before a Commissioner. By some unhappy inadvertence, the order was not abstracted and published in the back of one of our official volumes, as important orders usually are. In the circumstances, I strongly defend the right of the majority herein not to cite or discuss this order, still less to feel bound by it. The citation of unpublished decisions is widely condemned, and justly so in my opinion. Its unfairness is illustrated by this case: Government counsel herein was aware of the order, but Lindbergh Kirby's counsel was not. I mention it, not to refute the majority, but to explain the evolution of my own position. But for it, I would never have had a strong and fixed attitude about the law applicable to this case, and I must now make a conscious effort to remove it from my mind.

Putting Palmer and Anonymous, then, both out of mind, we have an issue that should be approached as res integra. It is understandable for experienced judges to be concerned about stale claims. Despite all that 28 U.S.C. — 2501 can do, and the related, anomalous, but well established doctrine of laches in pay cases, we face many situations where we must inquire into happenings

that are ancient history to many now living. The Government Records Disposal Program creates a constant hazard that facts will have to be found on the basis of documents that once existed but do so no longer. As an example of the problem **Small v. United States**, 200 Ct. Cl.—, 470, F. 2d 1020 (decided December 12, 1972), will serve. Some of our judges thought our oaths required us to investigate matters occurring as far back as 1951 (nineteen years before suit was brought) despite the Government's good faith destruction of all records directly relating thereto. It is understandable to shy away from a construction of 28 U.S.C 2501 which would add another class of such cases to those we already have. Regarding the prevailing opinion as a legislative document, it is carefully considered, thorough, and I would say, irrefutable on its own terms.

My own attitude is, however, that the writing of statutes of limitations, though necessary, is a function of legislatures, not of courts. The Government's consent to be sued is, of course, strictly construed, but we have, I think, endeavored to read 28 U.S.C 2501 in a manner that is fair to claimants too. I think courts should indulge a presumption in favor of their own jurisdiction, and be reluctant to deny anyone his day in court unless lack of jurisdiction is clearly the legislative will. **Cf. Charlson Realty Co. v. United States**, 181 Ct. Cl. 262, 384 F. 2d 434 (1967), as an interesting example of judicial struggle with these principles.

Denial on the basis of subsidiary, judge-made encrustations on the statute is a form of judicial legislation. I would employ laches to defeat claims when the unexcused lapse of time in suing has worked real unfairness to the Government. It may be noted, however, that the records in Lindbergh Kirby's case have survived and his delay in suing has not really hurt anyone but himself.

Thus, even if a legislature which foresaw Kirby's claim would have provided against it, unless his suit was

timely in Judge Bennett's terms, I would not now do the legislature's work. I would hold the plaintiff not barred by 28 U.S.C 2501, and entitled to summary judgment in his favor on the cross motions, with respect to retirement pay only.

IN THE UNITED STATES COURT OF CLAIMS
No. 57-71

WENDELL P. RYNERSON
v.
THE UNITED STATES

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, Judges.

ORDER

This case comes before the court on plaintiff's exceptions to the report of the trial commissioner. After considering the briefs of the parties and after hearing oral argument, the court finds that on October 14, 1945, plaintiff was honorably discharged in the rank of captain and at the time of his discharge was credited with 17 years, 10 months, and 23 days of Reserve military service towards retirement; that on February 25, 1971, he filed his suit in this court for retired pay, and that on May 11, 1973, after the filing of the commissioner's report, the court handed down its decision in Lindbergh Kirby v. United States, Docket No. 760-71. Although plaintiff represented himself ably and endeavored to distinguish his case from Kirby on several grounds, the

court has, after carefully reconsidering its decision in the Kirby case, concluded that the cases cannot be distinguished and that the court should adhere to its decision in Kirby.

IT IS THEREFORE ORDERED that plaintiff's petition be and the same is hereby dismissed.

BY THE COURT

JUN 22, 1973 Wilson Cowen

Chief Judge

In The United States Court of Claims

489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw 259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72) 326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley 461-70 Marvin J. Griggs 57-71 Wendell P. Rynerson 357-71 Robert H. McKelvy and Maxine McKelvy 358-71 R. Hugh McKelvy and Tula E. McKelvy 516-71 Koppers-Clough, A Joint Venture 554-71 Optimum Designs, Inc. 760-71 Lindbergh Kirby App. 9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al. 315-72 Cyril K. Chappuis 195-73 Athony George Galopin (formerly 257-64)	)	v. The United States

Before COWEN, Chief Judge, LARAMORE and DURFEE, Senior Judges, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges, except that Sr. Judge Laramore participated only in No. 489-54, Sr. Judge Durfee participated only in Nos. 489-54 and App. 9-72, Judge Kashiwa did not participate in Nos. 489-54 and App. 9-72, Judge Kunzig did not participate in No. 489-54 and Judge Bennett did not participate in Nos. 489-54 and 544-71.

ORDER

These cases come before the court on motions for rehearing, for new hearing, to vacate the order of the court, for reconsideration, for new trial, for amendment of judgment, for clarification, to reopen case and for further relief under Rules 151 and 152 of the Rules of this court and on consideration thereof,

IT IS ORDERED this 17th day of October, 1973, that said motions be and the same are denied as follows:

489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw. Plaintiff's motion for rehearing.

259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72). Plaintiffs' motion for new hearing.

326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley. Plaintiffs' motion for rehearing.

461-70 Marvin J. Griggs. Plaintiff's motion to vacate order of the court and petition to reconsider.

57-71 Wendell P. Rynerson. Plaintiff's motion for a rehearing and plaintiff's motion for a trial and-or reconsideration.

357-71 Robert H. McKelvy and Maxine McKelvy

358-71 R. Hugh McKelvy and Tula E. McKelvy. Plaintiffs' motion for amendment of judgment or rehearing.

516-71 Koppers-Clough, A Joint Venture. Defendant's

motion for rehearing or clarification.

554-71 Optimum Designs, Inc. Plaintiff's motion to reopen case No. 554-71.

760-71 Lindbergh Kirby. Plaintiff's motion for reconsideration of court's decision of May 11, 1973.

9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al. Motion of Appellee-cross-appellant (United States) for rehearing to amend order.

315-72 Cyril K. Chappuis. Plaintiff's request for rehearing and for remand.

195-73 Anthony George Galopin (formerly 257-64). Defendant's motion requesting the court to characterize plaintiff's submissions as a Rule 36 petition and to vacate due date for filing answer.

BY THE COURT
Wilson Cowen
Chief Judge

SKELTON, Judge, would allow the motions in Nos. 357-71, 358-71 and App. 9-72.

FILED
OCT. 17, 1973
COURT OF CLAIMS

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No. 73-1084

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

WENDELL P. RYNERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1084

WENDELL P. RYNERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims dismissing his suit for retirement pay as barred by the applicable statute of limitations.

1. Petitioner served as an enlisted man and Reserve officer in the United States Army from November 22, 1927 to October 14, 1945, when he was relieved from active duty and discharged from his Reserve status as the result of a reclassification proceeding (Pet. App. 10-11). Pursuant to 10 U.S.C. 1331, petitioner was credited with 17 years, 10 months and 23 days of satisfactory service for entitlement to retired pay at age 60 (Pet. App. 8).

After two unsuccessful applications in 1957-1960 to the Army Board for Correction of Military Records for review of his discharge, and following denial of his claim on May 20, 1965 for retired pay benefits to begin

retroactive to May 1, 1965,[1] petitioner filed this suit in the Court of Claims on February 25, 1971, claiming that the termination of his commission and the denial of his application for retroactive retirement pay were "arbitrary [and] capricious" (Pet. App. 8, 11-12). The Court of Claims, relying on its recent decision in *Kirby* v. *United States*, 201 Ct. Cl. 527, petition for a writ of certiorari pending, No. 73-1257 (Pet. App. 15-34), dismissed the petition as barred by the statute of limitations (Pet. App. 34-35).[2]

2. The decision of the Court of Claims is correct and further review is not warranted. *Kirby* v. *United States*, *supra*, is correctly decided and is dispositive of petitioner's claims. See also *Hames* v. *United States*, 164 Ct. Cl. 746, certiorari denied, 377 U.S. 904; *Palmer* v. *United States*, 121 F. Supp. 643 (Ct. Cl.).

In *Kirby*, *supra*, a former Air Force sergeant brought suit in 1971 for active duty pay and allowances and retirement pay and allowances denied him as a result of an allegedly illegal 1963 discharge. In addition to holding the active duty pay claim barred by the six-year statute of limitations in 28 U.S.C. 2501 covering "[e]very claim of which the Court of Claims has jurisdiction" (Pet. App. 16-18), the court squarely held that when entitlement to retirement benefits depends upon invalidating an allegedly illegal discharge, an action for retirement pay brought more than six years subsequent to the discharge is also time-barred (Pet. App. 20-21):

---

[1]Petitioner attained the age of 60 on April 28, 1965 (Pet. App. 11).

[2]Prior to the *Kirby* decision, the Court of Claims on November 11, 1971, initially denied the government's motion to dismiss based upon the statute of limitations (Pet. App. 9-10).

> [O]nce this plaintiff was officially discharged from the Air Force, he lost the right to earn future active duty pay, and, since he had not, at that moment, completed 20 years of service, the future right to receive retirement pay and allowances lapsed as well. The plaintiff had 6 years in which to challenge in court the legality of his discharge in order to protect his right to * * * obtain the needed years of service for retirement. This he did not do and cannot be allowed to do at this time through the vehicle of the retirement claim. The one rests on the other like a house on a foundation; without the foundation, the house will not stand.

In so holding, the court specifically rejected the basic contention raised by petitioner in this Court, *i.e.*, that his cause of action only accrued when he reached retirement age, stating (Pet. App. 26):

> The short answer to this idea supporting the proposition that a man should be permitted to sue at his convenience, for retirement on the basis of time not served, is that if the serviceman is discharged without having served 20 years, and he is unwilling to protect his right to continue to serve within the reasonable length of time provided by law, then he has no basis for seeking benefits that are supposed to accrue only to those who serve honorably for 20 years. Any other rule than here announced will lead to the filing of stale claims 25 years old, or older, and emasculate the statute of limitations. This is contrary both to law and public policy.

3. Petitioner's claim for retirement pay rests on two grounds: first, petitioner contends that his 1945 discharge operated only to remove him from active duty

and did not remove him from reserve status (Pet. 5-6). This contention was rejected by the Court of Claims (Pet. App. 9) and other than reiterate his original contention petitioner has made no attempt to support his position. The decision of the Court of Claims must therefore be accepted as correct.

Petitioner's second ground is that his 1945 discharge was arbitrary and capricious. As noted above, the Court of Claims correctly held that any claim based on the 1945 discharge was barred by the statute of limitations. This is not a case where a party discovers upon reaching retirement age that his entitlement to benefits turns on a challenge to his discharge. Petitioner was aware at least as early as 1957 that his discharge operated to deprive him of retirement benefits and petitioner made two unsuccessful attempts to have his discharge set aside (Pet. App. 11).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1084

WENDELL P. RYNERSON, - - - Petitioner

versus

THE UNITED STATES - - - - Respondent

On Petition For Writs of Certiorari to the
United States Court of Claims

PETITIONER'S REPLY BRIEF

WENDELL P. RYNERSON
403 E. Second Street
Madison, Inidana 47250

Petitioner and Attorney for Himself

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1084

WENDELL P. RYNERSON, - - - *Petitioner*

v.

THE UNITED STATES, - - - - *Respondent*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

The United States Memorandum in Opposition to certiorari contains 3 points.

Point 1 states that the claim was for termination of petitioner's Army reserve commission. Point 3 states (correctly) that his claim for money rested not only on that ground, but first on the ground

> "that his 1945 discharge operated only to remove him from active duty and did not remove him from reserve status . . ."

as a commissioned reserve officer.

Respondent then states that ". . . other than reiterate his original contention petitioner has made no

attempt to support his position." On the contrary, the petition for certiorari at pages 38-42 argues:

> "B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action."

namely, that the 1945 discharge operated only to remove him from active duty and did not remove him from reserve status. When the lower court declined to permit an evidentiary hearing on this point, all that the petitioner could do was reiterate his contention and argue as he did at pages 38-42, that the denial of any evidentiary hearing on the point was improper. The petitioner's STATEMENT OF THE CASE also relates to this point, in paragraphs numbered 5, 6, 11, 13-16, 19 and 25.

Opposition Point 2 quotes from *Kirby* v. *US,* 201 Ct. Cl. 527. That opinion and accompanying dissents are set out in Pet. App. 15-34. The petition of Rynerson for certiorari discusses or mentions Kirby or his case on pages 2, 10-13, 15-19, 22, 25, 28-34, 36-38 and 40-42. This was adequate criticism of and distinction from the Kirby case as to which a petition for certiorari (73-1257) is also pending.

Page 4 of the opposition memorandum says that petitioner was aware at least as early as 1957 that his discharge operated to deprive him of retirement benefits and mentions that he made two unsuccessful (administrative) attempts to have his discharge set aside. On the contrary, petitioner was only aware that the discharge *might* operate to deprive him of retire-

ment benefits. His efforts to avoid such a future construction of the effect of the discharge should not be held against him. He should be commended for trying to avoid litigation in court.

The opposition memorandum fails to discuss important public policies such as the rule against splitting causes of action. See page 32 of the petition for certiorari. *Kirby* v. *US* manages to sound plausible because it also fails to discuss such principles. The Court of Claims in *Kirby* cavalierly disregarded the extra work it would impose on other courts of the federal system.

The Court of Claims in 1971 said that Rynerson had timely presented a claim (for wrongful discharge; Pet. App. 9). In 1972, a Commissioner of that court tried the issue of the wrongfulness of the discharge (Pet., Statement of the Case, ¶ 16, page 8). The lower court itself did not decide that issue, nor set aside the 1971 ruling. Its 1973 dismissal of Rynerson's claim on the ground of the statute of limitations under these circumstances was a denial of due process.

The time of accrual of a claim, under the statute of limitations, must be considered. The lower court ignored the rule that a claim for money against the government does not mature until the claim is presented to the executive branch of the government. *Taylor's Administrator* v. *US* (1878), 14 Ct. Cl. 339, 353, affirmed in *U. S.* v. *Taylor* (Oct. 1881), 104 U. S. (14 Otto) 216, 26 L. ed. 721. That could not and did not happen here until 1965; suit was filed within 6 years from then.

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be granted.

WENDELL P. RYNERSON
403 E. Second Street
Madison, Indiana 47250

Petitioner and Attorney for Himself